

No. 25-1575

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE SUSTAINABILITY INSTITUTE, *et al.*,
Plaintiff-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States,
et al.,
Defendant-Appellants.

**APPELLEES' RESPONSE IN OPPOSITION
TO APPELLANTS' MOTION TO STAY PENDING APPEAL**

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INTRODUCTION

After declining to contest the merits of many Appellees' claims, Appellants now seek to escape thoughtfully crafted district court orders that prevent their continued illegal interference with congressionally mandated grant programs.¹

Throughout this litigation, Appellants have failed to seriously dispute their violations of both the Constitution and the Administrative Procedure Act. And when the district court ordered Appellants to produce evidence to substantiate their assertions, the truth of their illegal behavior was brought into sharp focus. At that point, Appellants simply conceded the claims against them.

Now, rather than defend their actions on the merits, Appellants craft byzantine theories of jurisdiction that, if taken seriously, would leave Appellees without any avenue to challenge Appellants' unconstitutional actions. In other words, having been caught red-handed in their defiance of Congress, Appellants now seek to evade accountability from the judiciary.

But established jurisprudence confirms federal district courts have equitable jurisdiction over challenges to the unconstitutional acts of federal officials, which are not shielded by sovereign immunity. Appellees' substantive and procedural APA

¹ The district court looked in detail at each of the relevant grant programs and subsequently declared unlawful and enjoined Appellants' actions as to all Appellees' grants except those under the Partnerships for Climate-Smart Commodities program, which Appellants did not concede, and which are still at issue below. Those grants are not part of this appeal.

claims for equitable relief, which Appellants have conceded on the merits, are also properly heard in federal district court. Appellants’ attempt to overread the Supreme Court’s recent emergency ruling in *California v. Department of Education*, 145 S. Ct. 966 (2025), should be seen for what it is—a misleading attempt to evade review. Appellees’ claims enforce Congress’s laws and the Constitution and seek forward-looking equitable and declaratory relief, not money damages; they belong in federal district court, not the Court of Federal Claims.

Appellants’ persistent attempts to mischaracterize the relief Appellees seek means they also overlook the harm Appellees will suffer if a stay is issued. Appellees—nonprofit groups and cities—worked tirelessly to craft and implement the work plans blocked by Appellants’ actions. Appellees do not seek “damages”; they want to get back to work helping their communities with everything from affordable housing to sustainable agriculture. Since January 20, Appellees have been plunged into chaos, unable to fulfill their grant obligations, employ staff, and uphold their reputations in the communities that rely on them. With the district court’s order, Appellees finally got relief. A stay would pull the rug out from underneath them, again. Meanwhile, Appellants offer *no evidence* a stay is needed to prevent irreparable harm to them.

All this, coupled with the clear public interest in maintaining constitutional order and ensuring the money appropriated by Congress can reach the communities it was intended to serve, means Appellants' motion should be denied.

BACKGROUND

I. Appellees' Congressionally Appropriated Grant Funding

The United States has a long, successful history of congressionally mandated grant programs that work in partnership with nonprofit and government entities on the ground. These efficient programs ensure congressional spending can get where it is most needed without expanding federal infrastructure. For example, in 2021, Congress directed investment in transportation, broadband, and energy infrastructure via federal grant programs for nonprofits and cities under the bipartisan Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (Nov. 15, 2021) ("IIJA"), and in 2022, Congress enacted the Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (Aug. 16, 2022) ("IRA"), which likewise accomplishes a significant portion of its objectives via delegated grant programs. Congress legislated in detail how these programs should be administered, and appropriated funding with specificity, not as lump sum payments. *See, e.g.*, 42 U.S.C. § 7437(a)–(d) ("Greenhouse gas air pollution plans and implementation grants" program, appropriating funds EPA "shall" use to "award grants" to local governments to implement plans "for the reduction of greenhouse gas air pollution").

Across the United States, nonprofit organizations and municipalities answered these calls by engaging with their communities to craft grant proposals as part of rigorous application processes, and, ultimately, began implementing work plans to advance Congress's goals. As they pursue this important work on the ground, grant recipients are allowed to withdraw money only incrementally, generally to recompense past expenditures, from Government-controlled accounts. *See, e.g.*, D.Ct. Dkt. 157 at 19.

II. Appellants Freeze and Terminate Congressional Grant Programs

This community-centered work ground to a halt when Appellants abruptly froze and later terminated entire grant programs as contrary to the President's policies. In the ensuing chaos, grants have been turned on and off, and Appellees have been forced to abandon community assistance essential to their missions and even lay off staff. *See* D.Ct. Dkt. 24-1 at 29–30. Many Appellees worry they will be unable to accomplish goals set out in their three-year work plans. *See, e.g.*, D.Ct. Dkt. Nos. 24-2 at 4–5 ¶ 8, 24-6 at 5 ¶ 9.

President Trump issued Executive Orders that directed this interference with congressional grant programs. Executive Order 14154, “Unleashing American Energy,” (“Energy EO”), directs federal agencies to “Terminat[e] the Green New Deal”—meaning to stop the disbursement of all funds appropriated under the IRA and IIJA—and forbids the disbursement of any funds the Executive branch deems

“contrary” to the President’s policies. 90 Fed. Reg. 8353, §§ 2(i), 7 (Jan. 29, 2025). And Executive Order 14151, “Ending Radical and Wasteful Government DEI [Diversity, Equity, and Inclusion] Programs and Preferencing,” (“Equity EO”), directs agencies to “terminate . . . all . . . ‘equity-related’ grants or contracts” within sixty days. 90 Fed. Reg. 8339, § 2(b) (Jan. 29, 2025).

Appellants implemented these orders, first freezing and then terminating entire grant programs for pure policy reasons—as they conceded below: “The pauses and terminations here are not based on grantee compliance; they are based on the agency’s review of whether federal funds are being spent in a manner that best promotes the Executive’s agenda.” D.Ct. Dkt. 56 at 21. They did so by broadly identifying statutory programs they deemed to advance policies disfavored by the President, including targeting programs created under the IRA and IIJA, D.Ct. Dkt. 23-8 at 2, and by using arbitrary keyword searches such as “greenhouse gas,” “climate change,” and “equality.” *E.g.*, D.Ct. Dkt. 23-10 at 2; 23-12 at 1; 23-14 at 2–3; 147-1 at ¶¶ 17–18.

In so doing, the Executive terminated the very priorities Congress funded. *Compare, e.g.*, 42 U.S.C. § 7438 (“Environmental and climate justice block grants” program, which EPA “shall” use to “award grants” for specified environmental projects to “benefit disadvantaged communities”), *with* D.Ct. Dkt. 147-4 at 2 ¶ 3, 110 ¶ 6 (terminating Environmental and Climate Justice Block grant “program[.]”

for “policy reasons”); D.Ct. Dkt. 95-1 at 99 through 95-2 at 7 (identifying “Environmental justice” as rationale for termination).

III. Appellees Challenge the Program Freezing and Termination Actions

Appellees filed this action after Appellants’ actions upended their ability to continue the work they had promised their communities. On March 26, 2025, Appellees amended their complaint, D.Ct. Dkt. 23, and moved for a preliminary injunction. D.Ct. Dkt. 24. Because Appellants had engaged in shifting narratives and justifications for their actions, Appellees also moved for expedited discovery to fully understand what actions led to the freezing and termination of their grants. D.Ct. Dkt. 25.

On April 9, 2025, the district court narrowed Appellees’ discovery requests and granted expedited discovery. D.Ct. Dkt. 45. Appellants moved for reconsideration and a stay, arguing the court lacked jurisdiction. D.Ct. Dkt. 46, 48. In response, the court explained that limited discovery would assist in determining its jurisdiction. D.Ct. Dkt. 52. Appellants did not appeal and ultimately produced what the court described as a “document dump,” Suppl. App. 52, with none of over 9,000 documents containing any individualized evaluation of Appellees’ grants or the review the APA requires, Suppl. App. 71.

At a hearing on April 23, 2025, Appellants’ counsel conceded for the first time the grant freezes occurred *en masse*, but stated, “I do think the terminations were

done based on a review of the grants.” Suppl. App. 35. The court invited Appellants to produce any additional documents to support this contention of a reasoned and individualized grant termination process. Suppl. App. 71–72; *see also* D.Ct. Dkt. 146 at 14–17.

The court then issued an order determining it had jurisdiction, including over Appellees’ APA claims. D.Ct. Dkt. 146. Applying *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the court explained that Appellees sought to continue the work in their communities via forward-looking equitable and declaratory relief against agency actions, not backward-looking money damages pursuant to a contract dispute. *Id.* at 4–9. As such, the court concluded this case is significantly different from *California*, *id.* at 9–12, and that the highly specific grant programs created by Congress were not committed to agency discretion under *Lincoln v. Vigil*, 508 U.S. 182 (1992). *Id.* at 9–14. The court also ruled that grants that had already been unfrozen, many following a preliminary injunction in *Woonasquatucket River Watershed Council v. U.S. Department of Agriculture*, 2025 WL 1116157 (D.R.I. April 15, 2025), should remain so.

Ultimately, Appellants did not produce any evidence to support their claims of a reasoned individualized grant review process. Instead, they filed declarations admitting they cancelled grants in bulk without reviewing individual grants, assessing the impact of the terminations, or engaging in any other reasoned process.

EPA Assistant Deputy Administrator Voyles explained on February 25, 2025, he unilaterally and in one day determined several grant *programs* should be terminated “for policy reasons.” D.Ct. Dkt. 147-4 at 2 ¶ 3. These included all grants in the Environmental Justice Collaborative Problem Solving Agreement Program, Community Change Grants, and the Environmental Justice Government-to-Government Program at issue in this case.² USDA made similar broad, program-wide terminations, including freezing some grant programs because they contain unspecified “DEIA”³ terms disfavored by the Administration, D.Ct. Dkt. No. 147-1 at ¶¶ 17–24, or merely because grants used “IRA funding.” D.Ct. Dkt. 136-1 at 3–4. Appellees’ Department of Transportation grants were put on hold indefinitely to determine whether whole grant “programs” align with administration priorities. Dkt. No. 147-3 at ¶¶ 4–5. And a Department of Energy grant was frozen without explanation despite Congress’s mandate that IRA funding for this program be used for energy efficiency projects just like the grantee’s. D.Ct. Dkt. 149 at 20–21.

² Attachments to Mr. Voyles’s declaration refer to his decision to terminate the “Environmental Justice Block Grant Program,” *id.* at 110 ¶ 6, which includes Community Change Grants, Environmental Justice Collaborative Problem Solving grants, and Environmental Justice Government-to-Government Grants. *Inflation Reduction Act Environmental and Climate Justice Program*, EPA, <https://www.epa.gov/inflation-reduction-act/inflation-reduction-act-environmental-and-climate-justice-program> (last updated Mar. 27, 2025).

³ “Diversity, equity, inclusion, and accessibility.”

Appellees explained in detail how these policy-based decisions violated both the APA and the Constitution. D.Ct. Dkt. 149. The district court gave Appellants yet another chance to explain how these actions were lawful. Rather than muster any explanation, on May 16, 2025, Appellants stated they would no longer “contest judgment on the merits of Appellees’ APA claims,” other than for six specific grants not part of this appeal. D.Ct. Dkt. 153 at 1.

On May 19, 2025, at a second hearing, the court announced it would enter judgment and a permanent injunction on the APA claims Appellants no longer contest, and would issue a preliminary injunction on Appellees’ nonstatutory review claims for *ultra vires* actions. Suppl. App. 126–27. The court issued a written order on May 20, 2025. D.Ct. Dkt. 157.

ARGUMENT

Appellants cannot satisfy the four-factor test governing their request for a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009). They will not succeed on the merits. They have produced no evidence they will be irreparably injured absent a stay. By contrast, a stay will substantially injure Appellees and the communities they serve and is not in the public interest.

I. Appellants Cannot Make a Strong Showing They Will Succeed on the Merits.

Appellants make no effort to defend the lawfulness of their conduct. Subject to unavailing jurisdictional objections, they consented below to judgment on the

merits of Appellees' APA claims, including claims that their actions violated the constitutional principle of separation of powers. And in this Court, they mount no substantive defense to the charge that their actions are unconstitutional and *ultra vires* for purposes of Appellees' nonstatutory review claims. Instead, their position is that the district court had no jurisdiction to review or restrain their actions, lawful or not. It is striking for Appellants to effectively concede the government is acting unconstitutionally. It is even more striking for Appellants to seek equitable relief from this Court so their lawless conduct may continue. But at bottom, Appellants' jurisdictional arguments are simply wrong. They cannot show likelihood of success.

A. Appellants consented to judgment on the merits of the APA claims and their jurisdictional objections are wrong.

Much here is undisputed. Appellants do not contest Appellees' claims that their actions were "contrary to constitutional right, power, privilege, or immunity," made "in excess of statutory jurisdiction, authority, or limitations," "not in accordance with law," and "arbitrary [and] capricious" under the APA. 5 U.S.C. § 706(2)(A)–(D); *see also* D.Ct. Dkt. 153 at 1. Their concession includes that they acted contrary to their constitutional authority when they disregarded congressional spending decisions and the executive branch's responsibility to faithfully execute the law. *See* D.Ct. Dkt. 23 ¶¶ 318, 323–24. Statutory provisions in the federal grant programs mandate that funding be spent in specific ways. For example, the EPA Administrator "shall" use the Environmental and Climate Justice Block Grant

Program funds to award grants for specified activities. 42 U.S.C. § 7438(b). Appellees explained how their grants all align precisely with these statutory criteria. *E.g.*, D.Ct. Dkt. Nos. 24-02 at ¶¶ 2, 8; 24-06 at ¶¶ 2, 4-5, 9-10. Other statutory grants contain similarly exacting provisions. *See* D.Ct. Dkt. 24 at 26–27.

Appellants admit their actions represent an effort to flout the will of Congress because the President does not like congressional policies. They could not credibly claim otherwise. For example, Section 7 of the Energy EO directs the executive branch to “terminat[e]” the IRA and IIJA. And the Equity EO directs agencies to “terminat[e] . . . all . . . ‘equity-related’ grants or contracts” and scrutinize “‘environmental justice’ programs and policies,” Equity EO § 2, despite the fact that Congress expressly funded such grants. *E.g.*, 42 U.S.C. § 7438; IRA § 22007, 136 Stat. at 2022–23 (directing funding to many equity-related programs, including “Environmental and climate justice block grants,” and to “address racial equity issues”). “Because the Executive Order[s] direct Executive Branch administrative agencies to withhold funding that Congress has not tied to compliance with [the President’s policies], there is no reasonable argument that the President has not . . . violate[d] the constitutional principle of the Separation of Powers.” *City & Cty of San Francisco v. Trump*, 897 F.3d 1225, 1234–35 (9th Cir. 2018). Indeed, Appellees have stated quite clearly that they do not intend to ever spend the money Congress appropriated for these programs. *See, e.g.*, D.Ct. Dkt. 64 at 8.

Appellants also do not dispute their procedural violations of the APA. Among other things, they concede that they acted without considering Appellees’ “serious reliance interests,” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), and that they relied “on factors which Congress has not intended [them] to consider,” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), by terminating and freezing grant programs based on Presidential policies that are contrary to Congress’s specific directives.

Appellants say none of this lawlessness matters because the district court lacked jurisdiction to stop them. In their telling, the Tucker Act bars Appellees from seeking anything but contract damages via the Court of Federal Claims because the Tucker Act impliedly displaces the APA’s waiver of sovereign immunity. Dkt. 6 at 11.

Not so. Following the Supreme Court’s guidance in *Bowen*, the district court correctly determined it had jurisdiction over Appellees’ APA claims. D.Ct. Dkt. 146 at 12. After a careful review of the pleadings and discovery, the district court concluded Appellees’ “claims do not turn on the terms of a contract between the parties” and that “the source of the rights alleged in this action is federal law—namely the IRA, IIJA, and the Constitution—not any obligations outlined in the grant awards.” D.Ct. Dkt. 146 at 5–6. Indeed, the evidence showed Appellants did not even consider individual grant agreements before freezing them. *See, e.g.*, D.Ct.

Dkt. 147-4 at ¶ 3. As the district court found, Appellees here, like in *Bowen*, seek to “preserve their ongoing and prospective agreements with the Government” via declaratory and injunctive relief. D.Ct. Dkt. 146 at 7; *see also Bowen*, 487 U.S. at 905. The fact that a judicial remedy “may require one party to pay money to another” does not “characterize the relief as ‘money damages.’” *Bowen*, 487 U.S. at 893.

Appellants overread the Supreme Court’s recent emergency order in *California* and the concise order applying it in *American Association of College for Teacher Education v. McMahon*, No. 25-1281 (4th Cir.). In *California*, the district court found procedural irregularities in the termination letters for specific grants, concluding they failed to adequately explain the reasoning behind the terminations, without reaching the substantive APA claims. *Cal. v. Dep’t of Educ.*, 2025 WL 760825, at *2–3 & n.3 (D. Mass. Mar. 10, 2025). In contrast, the pleadings and evidence below show that “the terms and conditions of the individual grants are not at issue,” as the district court correctly concluded. D.Ct. Dkt. 146 at 11. Appellants violated substantive statutory and constitutional provisions, which have nothing to do with the terms and conditions of any specific agreement or the content of any letter.

Appellants also try to cloak their conduct in unreviewable discretion. The district court correctly rejected that argument too. Appellants rely entirely on *Lincoln*, but that case involved a “lump sum” appropriation lacking any “statutor[y]

restrict[ions] [on] what can be done with those funds,” *Lincoln*, 508 U.S. at 192 (citation and quotations omitted). By contrast, Congress legislated with great detail about how the grant funding at issue here must be spent, commanding that Appellants “shall” use funding for particular specified purposes, subject to specific restrictions. D.Ct. Dkt. 157 at 7, 17. As the Ninth Circuit recently explained while rejecting an identical argument from the government, “[t]he rule announced in *Lincoln* has no application where, as here, the agency fails to carry out a program that is *required* by statute” through the use of language like “‘shall’ [that] plainly imposes a mandatory duty.” *Community Legal Services in East Palo Alto v. U.S. Dep’t of Health and Human Servs.*, 2025 WL 1393876, at *4–5 (9th Cir. May 14, 2025).

B. Appellants will not succeed on the merits of the non-statutory review claims.

Appellants have no likelihood of success on Appellee’s claims for nonstatutory review of unconstitutional action. These claims center on the fact federal officials named in this action acted outside of their constitutional and statutory authority when they froze and terminated federal grant programs.

Here too, Appellants mount no substantive defense of their conduct and go all in on jurisdiction. But here too, they are wrong. Wholly apart from the APA, federal district courts have jurisdiction over nonstatutory review claims to enjoin government officials from violating the Constitution. *See, e.g., Free Enter. Fund v.*

Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 491 n.2 (2010) (collecting cases). This jurisdiction to enjoin constitutional violations specifically extends to “separation-of-powers claim[s].” *Id.* “[W]henever a separation-of-powers violation occurs, any aggrieved party with standing may file a constitutional challenge.” *Collins v. Yellen*, 594 U.S. 220, 245 (2021).

Appellants failed to contest this independent jurisdictional basis through several rounds of briefing below and offered only abstract objections at argument. *See* Suppl. App. 103–09. Their efforts in this Court fare no better. The government’s principal theory, here and in other cases like *California*, has been that the Tucker Act “impliedly forbids” APA claims in grant cases. But even if that theory were correct as to the APA (it is not), the theory simply does not apply to Appellees’ nonstatutory constitutional claims for at least two reasons.

First, Appellants’ argument is based on sovereign immunity and the interplay between the APA and the Tucker Act. But sovereign immunity “does not apply when a plaintiff files suit seeking equitable relief against federal officials . . . alleging that those officials . . . acted unconstitutionally.” *Strickland v. United States*, 32 F.4th 311, 363 (4th Cir. 2022). For such claims, the officials’ actions “are considered individual and not sovereign actions.” *Id.* (citation omitted). “So, there is no sovereign immunity to waive—it never attached in the first place.” *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996).

Second, the text of the Tucker Act cannot do the heavy lifting that Appellants need to evade Appellees' nonstatutory constitutional claims. When the government contends that a statute strips district courts of jurisdiction to hear constitutional claims, and the result would be that a party has no forum in which to assert its constitutional claims, the Supreme Court imposes a strict clear statement rule to avoid the "serious constitutional issues" that would arise if no such forum existed. *Webster v. Doe*, 486 U.S. 592, 603 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."). Appellants' theories would leave no forum for Appellees to bring their separation-of-powers claims because the Federal Circuit, which oversees the Court of Federal Claims, has held that the court cannot hear such claims since the relevant constitutional provisions are not "money-mandating." *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995). With this context, *Webster* forecloses Appellants' reliance on the Tucker Act. That statute contains no "clear" statement that Congress intended to extinguish constitutional claims relating to grants, *Webster*, 486 U.S. at 603, and Appellants do not contend otherwise. The most they offer is an "impli[cation]" that the Tucker Act precludes jurisdiction. Dkt. 6 at 11.

Faced with all this precedent, Appellants retreat to *Board of Governors of Fed. Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, 43-44 (1991) to suggest nonstatutory review is unavailable. But *MCorp* has no application here for several

reasons. First, *MCorp* involved alleged statutory violations, not constitutional ones. Appellants peddle a quotation about “vindicating” rights but elide that it was about vindicating “*statutory* rights.” *Compare* Dkt. 6 at 21, *with MCorp*, 502 U.S. at 43 (emphasis added). Second, the alternative forum in *MCorp* (the Foreign Intelligence Surveillance Court) provided for judicial review of the same statutory claim that the plaintiff sought to bring in district court, which, as discussed above, is not possible here. *See MCorp*, 502 U.S. at 43; *see also LeBlanc*, 50 F.3d 1028 (separation-of-powers claims cannot be heard in the Court of Federal Claims). Third, *MCorp* emphasized that the relevant statute “clearly and directly” stripped district courts of jurisdiction to hear claims. *Id.* at 44. The Tucker Act contains no such clear jurisdiction-stripping language.

Appellants also contend that nonstatutory review is available only to challenge “extreme agency error, not merely garden-variety errors of law or fact.” Dkt. 6 at 22–23 (quoting *DCH Reg’l Med. Ctr. v. Azar*, 925 F.3d 503, 509 (D.C. Cir. 2019)). They are wrong again. The standard they cite is from a line of cases that applies only to alleged *statutory* violations. District courts have jurisdiction to enjoin any *constitutional* violation. *Free Enter. Fund*, 561 U.S. at 491 n.2. In any event, this situation *is* extreme; the district court was “frankly, embarrassed for the government to read Mr. Voyles’ affidavit” describing the flouting of congressionally mandated grant programs. Suppl. App 116.

Finally, Appellants contend Appellees seek monetary damages and not equitable relief. *See* Dkt. 6 at 23. But the only case they cite in support of this contention concerns the APA's waiver of sovereign immunity, not a nonstatutory constitutional claim, and was a request for past due monetary damages to compensate for loss, rather than the prospective relief sought here. *Id.* (citing *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 263 (1999)).

Beyond these failed jurisdictional arguments, Appellants have barely contested the merits of Appellees' nonstatutory review claims. As the district court noted, the analysis for these claims is almost identical to Appellees' substantive APA claims challenging unconstitutional action and contravention of statutory authority, which Appellants have not contested. *See* D.Ct. Dkt. Nos. 157 at 14, 153 at 1, 9. The record below established that Appellants refused to implement specific grant programs Congress directed because the President opposed the policies Congress enacted and directed actions to undermine them. D.Ct. Dkt. 157 at 14. This is a straightforward failure to faithfully execute the laws which Defendants have failed to rebut either below or in this court.

II. Appellants Will Not Suffer Irreparable Harm.

Appellants will not be harmed at all, much less "irreparably injured," pending appeal. *Nken*, 556 U.S. at 434. Their argument that they may have to "make millions of dollars in grant funding immediately available" absent a stay is misleading and

unsupported by evidence. Dkt. 6 at 3. Grantees may only withdraw funds for “specific, approved purposes,” incrementally “as the Plaintiffs implement their grant program plans,” which have already been approved by Appellants. D.Ct. Dkt. 157 at 19. As the district court concluded, “[s]ufficient procedures have already taken place or are already in place to protect taxpayer dollars.” *Id.* Appellants have provided no evidence to the contrary in sworn affidavits or otherwise. *See* Fed. R. App. Pro. 8 (a)(2)(B). The Ninth Circuit recently faulted the government for its similar failure to provide any evidence of harm and distinguished the case from *California* on that basis. *Community Legal Services in East Palo Alto.*, 2025 WL 1393876, at *4–5.

Moreover, Appellants are “in no way harmed by issuance of a preliminary injunction which prevents [it] from enforcing restrictions likely to be found unconstitutional.” *Leaders of a Beautiful Struggle v. Balt. Police Dep’t*, 2 F.4th 330, 346 (4th Cir. 2021) (citation and quotations omitted). Congress appropriated this grant funding to be spent for specific purposes. Appellants’ real complaint is that they will be forced to stop illegally obstructing Congress’s funding directives. But as discussed above, Appellants do not control the Nation’s purse strings; Congress does. *Supra* at 10–12. Indeed, while Appellants claim the district court’s injunction imposes “a severe separation-of-powers harm on the Executive Branch,” Dkt. 6 at 24–25, the sole effect of the injunction is to prevent the Executive from terminating

Congress's spending programs and replacing them with the President's contrary policies.

Appellants' other arguments also fail. Appellants complain about a supposed "preclearance regime," Dkt. 6 at 25, ignoring the district court's well-supported finding that Appellants' "shifting post hoc justifications" to "evade court orders" in other cases necessitated ongoing oversight. D.Ct. Dkt. 157 at 8 n.6. They likewise ignore the court's statement that it will "promptly" allow "legitimate and lawful" terminations, *id.*—which to date Appellants have not proposed. Appellants also fault the district court for extending the injunction to awarded grants that lack "final grant agreements," Dkt. 6 at 25, despite their own concession to judgment "that would require Defendants to . . . negotiate" those agreements. D.Ct. Dkt. 153 at 1.

III. Appellees Will Suffer Irreparable Harm

Appellees will be "substantially injure[d]" by a stay. *Nken*, 556 U.S. at 434. A stay would plunge the Appellees, their employees, and the communities they serve back into chaos and uncertainty. The district court correctly found that Appellees made a "clear showing" of irreparable harm, D.Ct. Dkt. 157 at 15–17, which will return if the court's injunction is stayed pending appeal, allowing Appellants to illegally freeze and terminate Appellees' grants again.

Appellants are wrong when they claim the resulting harm to Appellees is purely "monetary." *Id.* at 26. They ignore the "dozens of examples" of irreparable

harm that flow from lost grant funding, which the district court found, D.Ct. Dkt. 157 at 16, based on a robust factual record. *See* D.Ct. Dkt. 64-2 (summarizing evidence and irreparable injuries).

First, projects central to Appellees’ missions will stall or simply disappear, such as the Sustainability Institute’s project to weatherize and upgrade low-income homes in Charleston, D.Ct. Dkt. 24-2 at ¶¶ 20, 39–41, and Agrarian Trust’s multi-state project to help underserved farmers secure land and farm sustainably, D.Ct. Dkt. 24-3 at ¶¶ 7–16. Further delays caused by the re-freezing of grants will frustrate Appellees’ ability to accomplish their multi-year workplans, *e.g.*, D.Ct. Dkt. 24-2 at ¶¶ 41–43, and likely force Appellees to lay off staff. *E.g.*, D.Ct. Dkt. 24-14 at ¶ 15; 24-3 at ¶¶ 17–18; 24-7 at ¶ 12. Unlike *California*, Appellees here do not “have the financial wherewithal to keep their programs running” absent grant funding. 145 S.Ct. at 969. *See, e.g.*, D.Ct. Dkt. 24-14 at ¶ 15; 24-3 at ¶¶ 17–18; 24-7 at ¶ 12.

Second, a stay will harm Appellees’ reputations, goodwill, and “community connections,” which are “significant and irreparable injuries.” *See HIAS, Inc. v. Trump*, 985 F.3d 309, 326 (4th Cir. 2021). Appellees have earned the trust of their communities as reliable partners and advocates. Appellees promised to complete critical projects on defined timelines. A stay would further erode their hard-earned trust and reputations in the community. D.Ct. Dkt. 64-2; D.Ct. Dkt. 24-1 at 33–34.

Third, a stay would irreparably harm City Appellees by hampering local job and business growth, undermining democratic referenda, jeopardizing their ability to plan for the future, diverting funds away from essential services for residents, and depriving their residents of access to important public programs. *See* D.Ct. Dkt. 64 at 18. These harms cannot be reduced to money damages and are thus irreparable.

IV. A Stay Would Harm the Public Interest

The public interest strongly disfavors allowing Appellants to resume their lawless conduct, particularly as they no longer defend the legality of their actions. *Nken*, 556 U.S. at 434. As this Court has observed, “the system is improved by an injunction” which “prevents the state from enforcing [policies] likely to be found unconstitutional.” *Leaders of a Beautiful Struggle*, 2 F. 4th at 346 (citation and quotations omitted).

Moreover, the public interest strongly favors the faithful execution of grant programs Congress created to help communities across the country address pressing issues ranging from climate change to environmental justice. Appellants have been quite clear they simply refuse to spend appropriated funds on these congressional priorities. *E.g.*, D.Ct. Dkt. 147-4 at ¶ 3, p. 110 ¶ 6. A stay would allow Appellants to continue harming the communities Congress sought to benefit.

CONCLUSION

For the foregoing reasons, the Court should deny Appellants’ motion for stay.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because the motion contains 5,145 words. The motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (6) because it has been prepared using Microsoft Word for Microsoft 365 in proportionally spaced 14-pt Times New Roman typeface.

/s/ Kimberley Hunter

Kimberley Hunter

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Kimberley Hunter

Kimberley Hunter

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

THE SUSTAINABILITY INSTITUTE,)	
et al,)	
Plaintiffs,)	April 23, 2025
)	
-versus-)	2:25-2152
)	
)	Charleston, SC
DONALD J. TRUMP,)	
et al,)	
Defendants.)	

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE RICHARD M. GERGEL
UNITED STATES DISTRICT JUDGE, presiding

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Proceedings reported by stenographic court reporter.
Transcript produced with computer-aided transcription
software.

1 Wednesday, April 23, 2025

2 (WHEREUPON, court was called to order at 10:01 AM)

3 **THE COURT:** Good morning. Please be seated.

4 Okay. We're in the matter of The Sustainability
5 Institute and others vs. Donald Trump and others,
6 2:25-2152.

7 Could counsel for the plaintiff who will be
8 speaking today identify for the record please?

9 **MS. HUNTER:** Kimberly Hunter will be speaking
10 for the plaintiff non-profit organizations and be taking
11 the balance of the argument, Your Honor.

12 **THE COURT:** Very good.

13 **MR. MILLER:** Good morning, Your Honor. Jonathan
14 Miller on behalf of the plaintiff cities for any questions
15 Your Honor may have about them.

16 **THE COURT:** Very good. Thank you.

17 And for the defendants?

18 **MR. TIMMONS:** Yes, Todd Timmons for the US
19 Attorney's Office.

20 **THE COURT:** Okay. Very good.

21 **MR. BERLINSKY:** Your Honor, Lee Berlinsky for
22 the US Attorney's Office.

23 **THE COURT:** Mr. Berlinsky, I didn't think they
24 would keep you quiet. Good to see you here.

25 **MR. BERLINSKY:** Thank you.

1 **THE COURT:** Folks, now, let me just, first of
2 all, say that when I schedule oral argument, I don't do it
3 simply to provide counsel an opportunity to repeat to me
4 what they've already put in their briefs. I've had a
5 chance to read the briefs and the underlying authorities.
6 And I have a number of specific questions I want to
7 address and I'll have you address. So rather than -- so
8 don't be expect to be able to sit up here and allocute.
9 If you have laid out oral argument, just throw it aside.
10 It's not going to happen.

11 And I thought the best order of this is to first
12 address the issue of jurisdiction. And then to the extent
13 we proceed from there, we will then address the other
14 issues.

15 So let me -- the Government has asserted that
16 this Court lacks jurisdiction. Who will argue that point?

17 **MR. TIMMONS:** I will, Your Honor.

18 **THE COURT:** Okay. Very good. Mr. Timmons, let
19 me just ask you a beginning question here. Has Bowen been
20 overturned?

21 **MR. TIMMONS:** Good morning, Your Honor. I
22 haven't had the privilege of being in your courtroom
23 before, but it is a pleasure to be here on behalf of the
24 USA.

25 **THE COURT:** Glad to have you here.

1 **MR. TIMMONS:** No, Your Honor, it has not been
2 overturned.

3 **THE COURT:** So tell me why I don't have
4 jurisdiction.

5 **MR. TIMMONS:** You don't have jurisdiction, Your
6 Honor, because cases about grant funding are cases about
7 money. That's what the Supreme Court has said.

8 **THE COURT:** Maybe I'm wrong, I thought Bowen was
9 a grant case.

10 **MR. TIMMONS:** I can't remember if it was a
11 grant.

12 **THE COURT:** It's a money case, a grant to the --
13 under the medicaid program to states.

14 **MR. TIMMONS:** Right.

15 **THE COURT:** Authorized by an act of Congress.

16 **MR. TIMMONS:** Right. I can't remember what the
17 term is, if it would be a grant or if that's a statutory
18 entitlement. But your point is well taken.

19 **THE COURT:** And it required -- going forward it
20 required the payment of money by the United States to the
21 State of Massachusetts, correct?

22 **MR. TIMMONS:** Correct.

23 **THE COURT:** Okay. So tell me why these -- so
24 you're not arguing that every grant must be -- every
25 dispute over a grant must be in the Court of Claims, are

1 you?

2 **MR. TIMMONS:** Unless -- it would unless it has
3 the characteristics that were found in Bowen. That case
4 was more about defining the relationship between the state
5 and the federal government for --

6 **THE COURT:** Case law doesn't follow that.
7 That's not that narrow. So let's just get to it. The
8 plaintiff -- I read the complaint. And I know under Bowen
9 we're supposed to search. We don't have to take the
10 complaint at its face value, correct?

11 **MR. TIMMONS:** Correct, Your Honor.

12 **THE COURT:** So I need to look at what remedy the
13 plaintiffs seek in this case, the non-profits and the
14 cities. And at least on the face of the complaint, they
15 seek equitable relief, do they not?

16 **MR. TIMMONS:** On the face of the complaint, yes.

17 **THE COURT:** And they -- and they're looking for
18 relief going forward, are they not?

19 **MR. TIMMONS:** I would say they're looking for
20 the value of their grant award.

21 **THE COURT:** That's a play on words. Are they --
22 answer my question. Are they seeking relief going
23 forward?

24 **MR. TIMMONS:** They're seeking relief the Court
25 of Federal Claims could provide them. That is different

1 --

2 **THE COURT:** You didn't answer my question. I
3 want you to answer my question then you can make your
4 argument. My question is simple. Are they seeking relief
5 going forward?

6 **MR. TIMMONS:** Yes, Your Honor.

7 **THE COURT:** And they're seeking as they describe
8 equitable relief, declaratory and injunctive relief, are
9 they not?

10 **MR. TIMMONS:** I think they're describing that.
11 I think that's in substance -- we've got to look at the
12 substance over the form. But, yes, they are asking for a
13 declaratory injunction just like the California plaintiffs
14 were.

15 **THE COURT:** Right. And by the way, do you think
16 California overruled Bowen?

17 **MR. TIMMONS:** I don't.

18 **THE COURT:** Okay. And what weight should I
19 give -- first of all, what was the record the Supreme
20 Court had when they issued the stay in California?

21 **MR. TIMMONS:** They had the application for stay
22 that the United States filed. They had the response to
23 the application the plaintiffs filed, which is much the
24 same that district courts have ruled on preliminary
25 injunction cases as well.

1 **THE COURT:** Is there a record? My question was
2 there an appendix or any kind of record?

3 **MR. TIMMONS:** No.

4 **THE COURT:** And as I understand, my
5 responsibility under Bowen is to make a searching
6 examination of the claim and the nature of the claim, to
7 look beyond the complaint itself to see what is the
8 essence of the claim and what relief -- and what relief
9 would be sufficient for the plaintiff should they have a
10 claim. Isn't that what I'm supposed to be doing?

11 **MR. TIMMONS:** Yes, Your Honor. I would phrase
12 it as what is their entitlement to recovery and what is
13 the source of relief they are seeking?

14 **THE COURT:** Right. And let me ask you this. If
15 I concluded that the only sufficient relief was injunctive
16 and declaratory, would the Court of Claims have
17 jurisdiction?

18 **MR. TIMMONS:** If the injunction is going to say
19 to pay money to the plaintiffs, then the Court of Federal
20 Claims would have jurisdiction over that.

21 **THE COURT:** Okay. If I ordered -- well, I
22 thought -- I might have misread Bowen. But I believe it
23 says that just because the payment of money is involved
24 doesn't make it a Tucker Act claim. Isn't that right?
25 Did I miss something there?

1 **MR. TIMMONS:** I think you have to look at --
2 that's a fair reading of Bowen.

3 **THE COURT:** Thank you.

4 **MR. TIMMONS:** You ignore -- you would ignore the
5 other characteristics of Bowen, which is the ongoing
6 relationship between the parties that the Court of Federal
7 Claims can't reach; that is, how is medicaid between the
8 federal and state government --

9 **THE COURT:** Let me say this. If you're arguing
10 that Bowen is limited to its facts and no further, you
11 ignore 50 years of jurisprudence which I don't elect to
12 do. Okay? So you're not going to persuade me that the
13 facts of Bowen are as far as Bowen goes. That is not the
14 way I read Bowen. And that's not the way dozens of my
15 colleagues around the country have read it over 50 years.
16 So let's just dispense with that argument.

17 I just don't know what to make of the cursory
18 order in the denial or the grant of the motion to stay.
19 I've always been taught that that doesn't generally
20 overturn existing Supreme Court authority. Is that fair?

21 **MR. TIMMONS:** Yes, Your Honor. And I think
22 that -- I read the Supreme Court order as distinguishing
23 Bowen on the facts, not overturning it.

24 **THE COURT:** Okay. Have any other courts
25 addressed this issue you're aware of? What does the

1 California court mean? What does the California decision
2 mean? Any other courts addressed this issue?

3 MR. TIMMONS: Yes, Your Honor.

4 THE COURT: What have they said?

5 MR. TIMMONS: So we've got the Catholic Bishops
6 case, and that court had the same logic as the Supreme
7 Court and said that this is a Tucker Act case. The
8 plaintiffs have cited some other district courts that have
9 since --

10 THE COURT: What are those? What are those?

11 MR. TIMMONS: The Rhode Island case.

12 THE COURT: Yeah, Rhode Island, I've read that
13 one. What else?

14 MR. TIMMONS: New York v. Trump.

15 THE COURT: I've read that one. What else?

16 MR. TIMMONS: Then you have the Fourth Circuit
17 has looked at it and found that --

18 THE COURT: My circuit has looked at it?

19 MR. TIMMONS: Yes, Your Honor.

20 THE COURT: Okay. What case was that?

21 MR. TIMMONS: It was Association of Colleges for
22 Teacher Education. And in that case they applied
23 California and stayed injunctive relief granted by the
24 District Court in Maryland.

25 THE COURT: Okay. Did you happen in your work

1 overlook -- happen to come across Judge Wilkinson's recent
2 order?

3 **MR. TIMMONS:** I do not have that one, Your
4 Honor, no, I don't.

5 **THE COURT:** You're not familiar with Judge
6 Wilkinson's recent order indicating the need for the
7 Government to turn square corners? You know anything
8 about that case? You know anything about that decision?

9 **MR. TIMMONS:** I have heard that phrase used,
10 yes.

11 **THE COURT:** Justice Roberts, Chief Justice
12 Roberts also used it, didn't he? Actually it's Justice
13 Holmes' case.

14 **MR. TIMMONS:** Where he says that men must turned
15 square corners when dealing with the Government. And they
16 flipped it and said the Government must do the same.

17 **THE COURT:** Isn't that an interesting idea. So
18 tell me what other arguments you have other than that
19 Bowen should be limited to its absolute facts? Any other
20 arguments you've got?

21 **MR. TIMMONS:** And I don't say that Bowen should
22 be limited to the facts.

23 **THE COURT:** You'd be ignoring a lot of case law
24 if you did.

25 **MR. TIMMONS:** No, I don't. I do think that we

1 should follow this, California's logic though. I mean, I
2 think the plaintiffs --

3 **THE COURT:** I don't know what the California
4 logic is. They don't have a record. I'm supposed to --
5 I've been trying to dig into this thing. I don't see much
6 of an analysis at all. And it seems to be contrary to
7 what I'm supposed to do, to make a searching analysis,
8 which I don't think the court would say that it did. But
9 a number of courts have looked at this and have
10 generally -- you know I've issued an order that I said I
11 thought the Government was overreading the California
12 case. One day we'll find out am I right or wrong about
13 that, correct? But it looked like to me it was
14 overreading the decision. And it has extrapolated from a
15 cursory three or four-page order on a grant of a motion to
16 stay basically in overturning a body of 50 years of case
17 law. And I just don't -- I don't personally read it that
18 way. And I think that if that's the Government's view, we
19 kind of part ways.

20 **MR. TIMMONS:** Well, Your Honor, we can set
21 California aside and we can talk about the body of case
22 law that interpreted Bowen. I think that might be a more
23 --

24 **THE COURT:** I'll be glad to hear from you on
25 that.

1 **MR. TIMMONS:** So, one case, one recent case is
2 South Carolina v. United States where the court applied
3 Bowen, talked extensively about the Tucker Act, about the
4 Bowen line of cases. And that's where the principle is
5 that substance prevails over form.

6 **THE COURT:** Listen, that's been from the
7 beginning. But my question is simply this. If I
8 determine that the plaintiffs cannot get relief other than
9 by injunctive -- prospective injunctive relief,
10 declaratory and injunctive relief, then that case should
11 be in my court, should it not?

12 **MR. TIMMONS:** If you determine that, yes. But I
13 think to determine that would be error.

14 **THE COURT:** Well, you know, I used to --
15 Mr. Timmons, I used to practice in front of Judge
16 Hemphill. He's before your time. He was a district judge
17 up in the upper part of the state. And if you went to his
18 courtroom, he oddly had a roadmap on the wall of his
19 courtroom of the eastern United States. And when a
20 lawyer, particularly one from the Government, told him
21 they were going to appeal him, he would point to the map
22 and he'd say that's the road to Richmond. So I say to
23 you, there's a road to Richmond for you.

24 **MR. TIMMONS:** Understand. I mean, I think
25 another thing we should look at is the Maine Community

1 Health Options case. And in that case, we're talking
2 about losses suffered by a health plan. And those -- I
3 think if that case could be heard in the Court of Federal
4 Claims, certainly a case over whether grant funding has
5 been allocated properly could be heard in the Court of
6 Federal Claims.

7 THE COURT: Well, you know, all they're trying
8 to do here -- you know, they brought this suit. They're
9 not -- anything about back is purely incidental. They're
10 worried about going forward. I read these declarations.
11 These not-for-profits have certain missions, do they not?

12 MR. TIMMONS: Yes, Your Honor.

13 THE COURT: For the public good generally? Do
14 you agree?

15 MR. TIMMONS: I agree, yeah. Sure. I would
16 hope so.

17 THE COURT: And Congress appropriated acts under
18 the IRA and IIJA to fulfill certain public goods, correct?

19 MR. TIMMONS: Correct.

20 THE COURT: And these plaintiffs assert their
21 rights under those acts, do they not?

22 MR. TIMMONS: No, Your Honor.

23 THE COURT: Well, I disagree with you. They say
24 they got these grants under their act -- under those acts.
25 You don't think they got -- I mean, I'm confused. I

1 thought the OMB instruction and the EO and all that
2 related to not funding grants that were appropriated by
3 the -- that were authorized by the IRA and IIJA. Am I
4 wrong about that?

5 **MR. TIMMONS:** Their entitlement of funding came
6 from the executive's decision to award them a grant award.

7 **THE COURT:** Well, how about what did Congress
8 do? Did Congress have a role in this or does Congress not
9 exist anymore?

10 **MR. TIMMONS:** Congress authorized the lump sum
11 appropriations to agencies.

12 **THE COURT:** Does that matter? I think doesn't
13 Congress have the authority to appropriate? Doesn't it?

14 **MR. TIMMONS:** It mattered to the court in
15 *Lincoln v. Vigil*.

16 **THE COURT:** Does Congress have control of the
17 purse under the Constitution of the United States?

18 **MR. TIMMONS:** Yes.

19 **THE COURT:** And does the Executive Branch have
20 the duty to faithfully execute the laws of the Congress?

21 **MR. TIMMONS:** Yes, or to carry out the
22 discretion afforded to them by the Congress.

23 **THE COURT:** Right, if there's discretion. And
24 if there's not discretion, to faithfully execute the laws.
25 Am I right?

1 **MR. TIMMONS:** Yes, sir.

2 **THE COURT:** Okay. Anything further on the
3 Court's jurisdiction?

4 **MR. TIMMONS:** Yes, Your Honor. I mean, I think
5 we do need to look at the issue of agency discretion.
6 Because in Lincoln v. Vigil, and the Fourth Circuit said
7 in Holbrook that to find a statute is not discretionary,
8 you have to carefully examine the language. And here, if
9 we look at the language, it's not clear what takes away
10 the discretion of these agencies to act.

11 **THE COURT:** How about if I determine that -- how
12 many -- first of all, how many grants were frozen?

13 **MR. TIMMONS:** There's 38 grant awards in this
14 case.

15 **THE COURT:** Not in my case. Generally. How
16 many grants were frozen?

17 **MR. TIMMONS:** I can't answer that, Your Honor.

18 **THE COURT:** Come on, you know that.

19 **MR. TIMMONS:** I don't.

20 **THE COURT:** A thousand?

21 **MR. TIMMONS:** Your Honor, I honestly don't have
22 that information.

23 **THE COURT:** Do you have any estimate? Give me a
24 range. More than a thousand?

25 **MR. TIMMONS:** I honestly do not know.

1 **THE COURT:** You don't know how many this
2 Executive Branch unilaterally froze with no notice? You
3 don't know that?

4 **MR. TIMMONS:** I don't.

5 **THE COURT:** That kind of goes to an issue about
6 whether it's arbitrary, capacious, if we get to that,
7 correct?

8 **MR. TIMMONS:** We don't think so, Your Honor.

9 **THE COURT:** I know you don't think so. But it
10 does raise -- you can't even tell me how many -- how about
11 just one agency, give me the EPA. How many did EPA
12 cancel?

13 **MR. TIMMONS:** Your Honor, I'm not general
14 counsel for the EPA. I can't speak --

15 **THE COURT:** You're here on behalf of them. You
16 indicated you represented them. I've had this with the
17 Department of Justice before, by the way, where they claim
18 -- they switch back and forth when you ask them a
19 question. So my thing is your answer is you have no idea,
20 no idea how many grants were frozen?

21 **MR. TIMMONS:** That is my answer, Your Honor.

22 **THE COURT:** Okay. And indications in the record
23 that it was because the agencies did not approve of the
24 IRA and IIJA. Isn't there evidence in the record that was
25 why it was not approved? That's at least what the Rhode

1 Island court found, did it not?

2 **MR. TIMMONS:** I think the fair characterization
3 of the order is they did not approve of how President
4 Biden's administration allocated funds under those two
5 laws.

6 **THE COURT:** That's how you interpret the Rhode
7 Island decision?

8 **MR. TIMMONS:** Well, I don't know why we would
9 defer to the Rhode Island decision if we're not deferring
10 to the Supreme Court.

11 **THE COURT:** I'm just asking. It's another
12 district court. I read the order. Have you read the
13 order?

14 **MR. TIMMONS:** I have.

15 **THE COURT:** I take it you don't agree with it?

16 **MR. TIMMONS:** Well, I just think, Your Honor, if
17 we're not going to give California credence, then we
18 shouldn't be giving district court decisions credence.

19 **THE COURT:** Well, at least, you know, I thought
20 Judge McElroy made a searching analysis of the issue of
21 jurisdiction, and whether the Tucker Act applied or
22 whether the APA applied. She did exactly what Bowen told
23 her to do. And I'm just sort of wondering -- and plainly,
24 the Supreme Court, in this very truncated order, which I
25 don't think they intended to be the final word on all

1 this, they always say that, that their shadow docket cases
2 are just temporary matters. So, you know, I've already
3 issue an order and said I thought you guys are overreading
4 that case. And we'll find out if I'm right or wrong. It
5 won't be the first time I'm wrong. Might not be the first
6 time you're wrong.

7 **MR. TIMMONS:** It would not be the first time I'm
8 wrong.

9 **THE COURT:** We all know that. And in these
10 times, you never know what was true yesterday is true
11 today. But my -- have you got anything else you want to
12 share with me about my jurisdiction?

13 **MR. TIMMONS:** I mean, Your Honor, I would just
14 share language from Great Wolf Life, which was quoted by
15 the Supreme Court, that says Bowen has no bearing on the
16 unavailability of an injunction to enforce a contractual
17 obligation to pay money past due. And I know Your Honor
18 said that --

19 **THE COURT:** You think this is a past due case, I
20 don't see this as a past due case. This is a going
21 forward case. These are not-for-profits. They're not
22 looking for a money damage. They're looking for to serve
23 the public to fulfill their mission going forward. To
24 characterize this as a pursuit for money damages has to
25 be, you know, it's complete -- in my view, and all due

1 respect to you, sir, it's completely unreasonable. It is
2 a complete mischaracterization of their claim.

3 And, you know, you want me to put -- you're
4 trying to put a size 10 foot in a size 4 shoe. It doesn't
5 fit. This is not a Tucker Act case. And maybe one day
6 somebody will tell me I'm wrong. But, you know, I've been
7 applying this case law for quite a while. And I -- you
8 know, I -- my understanding of this, I've studied this
9 complaint and the case law very carefully. This is a
10 claim going forward. I'll let the plaintiffs correct me
11 if this is a money damage claim for past amounts due.

12 We're only talking about a matter of maybe six or eight
13 weeks of monies haven't been paid. I don't think that's
14 the driving -- I don't think all these lawyers sitting
15 here would be here for six weeks of missed grants, do you?

16 **MR. TIMMONS:** Your Honor, I think, first of all,
17 I'd say it's not as if they've waived entitlement to past
18 due sums as a part of the relief they're seeking.

19 **THE COURT:** Well, you want them to do that?
20 Would it change the analysis if it's an incidental part of
21 the order? Bowen says that doesn't change the analysis.
22 But if you want them to, I bet you they would say, okay,
23 I'll give up the last six weeks of grants for the next
24 three or five years. Do you really think it turns on
25 that? I don't think it turns on that.

1 **MR. TIMMONS:** Well, I can address the going
2 forward relief as I see it. I mean, I think the reason
3 that that is a big part of the Bowen decision is because
4 it was going to be -- the law was going to be interpreted
5 in perpetuity.

6 I think here that if the Court of Federal Claims
7 issues a judgment that says you cannot pause a grant, you
8 cannot terminate a grant, then they're entitled to the
9 full value of that grant. There is no further statutory
10 interpretation that needs to be done. So the relief --
11 even if it is going forward relief, it can be awarded by
12 the Court of Federal Claims.

13 **THE COURT:** You think this is a money damage
14 case. And all due respect, sir, I think that's nonsense.

15 **MR. TIMMONS:** Well, I will take that as directly
16 as you put it and we'll move on to agency discretion. Is
17 that okay, Your Honor?

18 **THE COURT:** First of all, I have to determine if
19 I have jurisdiction before we do anything else.

20 **MR. TIMMONS:** Well, that's a jurisdictional
21 argument.

22 **THE COURT:** Tell me your jurisdictional argument
23 about agency discretion.

24 **MR. TIMMONS:** I would quote *Lincoln v. Vigil*,
25 which says, the allocation of funds from a lump sum

1 appropriation is another administrative decision
2 traditionally regarded as committed to agency discretion.
3 That principle was used in General Land --

4 **THE COURT:** I may have misread the statutes
5 here. And there are a number of them, I'll give it that.
6 But they generally say that they shall expend these funds.
7 And the EO and OMB documents say they shall not. And I
8 think there's a conflict there. And I don't think they
9 had the discretion to do what they did. And a number of
10 courts around the country have so found that. And, you
11 know, one day we're going to find out what the answer is.
12 But at this point, I'm going to stay with the precedence
13 of many years of case law.

14 So anything else you've got, I don't think it's
15 committed to agency discretion to violate an act of
16 Congress. I don't think -- an executive department has
17 lots of discretion. I am with you on that. I've upheld
18 agency discretion many times. I've got them in my MDL.
19 Believe me, I just ruled extensively on a case that
20 involves billions of dollars of potential exposure to the
21 United States and I said they didn't have it. I'm very
22 familiar with the idea of agency discretion. Let me say
23 this, this is not agency discretion.

24 **MR. TIMMONS:** And Your Honor, I would -- and
25 just one closing on that point, I would like to discuss

1 the General Land Office v. Biden case.

2 THE COURT: Okay. Go right ahead.

3 MR. TIMMONS: That case involved border wall
4 funding. The State of Texas said that the President could
5 not pause funding and redirect it for other purposes. And
6 the court said that is a discretionary decision. And that
7 was decided just last year. And so I think -- I mean, I
8 understand that there's an idea that the actions here
9 don't seem to be discretionary --

10 THE COURT: Have they reappropriated the money
11 they froze? I didn't know they had done that.

12 MR. TIMMONS: In the border wall case?

13 THE COURT: No. In these cases, have they
14 reappropriated the money?

15 MR. TIMMONS: In some cases, yes. In some
16 cases, no.

17 THE COURT: How about in the 19 here? Only four
18 have been terminated. I can't imagine they've
19 reappropriated the money.

20 MR. TIMMONS: I mean, I think we can't -- you
21 know, I can't say when that would happen. But it's
22 certainly --

23 THE COURT: It might happen, right?

24 MR. TIMMONS: Certainly. And it may --

25 THE COURT: It might not happen, right?

1 **MR. TIMMONS:** Correct. I mean, I just don't
2 think we can say in the courtroom today what may happen in
3 the future in any of these 21 programs.

4 **THE COURT:** All I can say is I have official
5 documents which state and which guided these agencies that
6 appears to me which said cancel everything funded by these
7 two congressional acts. And if that is really what
8 happened, and that's another issue, I mean, did it happen?
9 That's not jurisdiction, that's merits of the case, that's
10 a problem for the Government. If it didn't happen, you
11 might well have some good defenses.

12 **MR. TIMMONS:** Right. And I think I do want to
13 point out that that is not what the order said. The order
14 said to pause funding and determine if it's consistent
15 with the President's policy on energy, diversity, those
16 things. It did not say to cancel -- stop all funding in
17 these programs.

18 **THE COURT:** Let me ask you this. Did either --
19 well, let me -- we know what the executive order says.

20 **MR. TIMMONS:** Yes.

21 **THE COURT:** Has the OMB instructed agencies,
22 notwithstanding the EO, to pause all funding under the IRA
23 and the IIJA?

24 **MR. TIMMONS:** I don't have that information in
25 front of me. I don't know that. I don't know the answer

1 to that.

2 THE COURT: Well, that's a pretty important
3 point.

4 MR. TIMMONS: I don't think the record shows
5 that all funding has been paused.

6 THE COURT: My question is different. Has the
7 OMB instructed agencies regardless what the EO says about
8 limiting to the Green New Deal, that it should pause all
9 IRA and IIJA grants?

10 MR. TIMMONS: I do not know the answer to that
11 question.

12 THE COURT: I want you in three days answer that
13 question for me.

14 MR. TIMMONS: Yes, sir.

15 THE COURT: You might want to -- before you
16 represent that to me, you might want to look at some of
17 those documents you have under seal. You hear me?

18 MR. TIMMONS: Yes, Your Honor.

19 THE COURT: Okay. Anything further?

20 MR. TIMMONS: No, Your Honor.

21 MS. HUNTER: Your Honor, can I make a few points
22 on jurisdiction?

23 THE COURT: Absolutely. Let me make sure that
24 Mr. Timmons is finished first.

25 MR. TIMMONS: I think I'm finished, Your Honor.

1 **THE COURT:** Good. You can go back to the office
2 and complain about me.

3 Yes, ma'am?

4 **MS. HUNTER:** Thank you, Your Honor. We concur
5 with your general analysis of the Tucker Act as to our APA
6 claims.

7 **THE COURT:** Are y'all just looking for money
8 damages?

9 **MS. HUNTER:** We are not. As I think you
10 correctly stated, these are very hardworking, non-profit
11 organizations. A lot of them are here in the courtroom.
12 Some have come a long way to be here. They spend their
13 lives working to improve the public -- the public good and
14 all they want to do is get back to work. That's what --

15 **THE COURT:** So would they be happy if you just
16 paid them the six weeks back pay, back grant? Is that
17 going to make them happy.

18 **MS. HUNTER:** That wouldn't effectuate either
19 their aims or Congress' aims.

20 **THE COURT:** Do you read Bowen as saying if
21 there's some incidental payment of money as a result of an
22 order that that makes it a Tucker Act case?

23 **MS. HUNTER:** No, quite the opposite. I think it
24 expressly says the opposite. I don't think we need to
25 belabor those points unless you want to, Your Honor. But

1 I did want to point out one other key piece here. I think
2 in your conversation you've alluded to very serious
3 separation of powers concerns here. And in our case,
4 which is different than in California, different than
5 Rhode Island, we also have these ultra vires
6 constitutional claims, separation of powers claims, First
7 Amendment claims. And the entire reasoning behind the
8 California decision was based on the APA sovereign
9 immunity waiver and whether there was jurisdiction because
10 of that sovereign immunity waiver. And that just doesn't
11 apply to the plaintiffs ultra vires claims.

12 **THE COURT:** But the Rhode Island case found that
13 the agency acted ultra vires outside of its authority by
14 canceling grants because of the source of funding by
15 Congress.

16 **MS. HUNTER:** Absolutely, Your Honor. I just
17 wanted to be quite clear that in addition to all the
18 arguments that you've discussed today, there's also this
19 entire separate bucket that has nothing to the APA. So
20 regardless of kind of what develops with APA claims and
21 the Tucker Act, there has been no court that has said
22 ultra vires constitutional claims separate from the APA
23 would belong in the Court of Federal Claims because that's
24 just not the type of claim that Court of Federal Claims --

25 **THE COURT:** The constitutional claim that the --

1 the violation of the separation of powers.

2 MS. HUNTER: Exactly. And that jurisdiction is
3 squarely within this Court. And I think every day we see
4 more and more about how this case is fundamentally about
5 separation of powers. To build on the questions you were
6 just asking, I mean, my read of the executive orders is
7 pretty express that the President wants the IRA and the
8 IIJA terminated. He's said so again in a joint address to
9 Congress. And the White House said the same thing in
10 their Earth Day messaging yesterday. So --

11 THE COURT: Well, the OMB issued a memorandum to
12 all the departments heads, all the departments of the
13 Government, not just the EPA or anybody with the Green New
14 Deal, right?

15 MS. HUNTER: Correct, Your Honor.

16 THE COURT: I take that as not being an
17 accident, right?

18 MS. HUNTER: Right.

19 THE COURT: Why would he send it to every
20 agency? And, you know, it appears to me that there was an
21 intent to do exactly what you say, which is to -- that the
22 present administration does not approve of a prior act of
23 Congress. And, you know, there will be an administration
24 after this. And that administration might not like
25 something this administration did that Congress

1 authorized. Tough. They don't have a right to overrule
2 it.

3 We don't have -- you know, we don't have a king
4 in the United States. We have separation of powers. And
5 the power is diffuse. And some people would criticize the
6 American form of government as being inefficient because
7 it disburses power among threes branches of government.
8 But that's our system of government.

9 And, you know, one thing I think people have got
10 to be careful of is if you undermine the rule of law, it
11 will come back and bite you later when you are on the
12 other end of this. And the responsibility of the Court is
13 to preserve the system. We don't take sides. Whoever
14 wins or loses these fights is of no consequence to us.

15 **MS. HUNTER:** Exactly, Your Honor. And I think
16 we see this in the type of language that has been used in
17 the executive orders and memos is directly at odds with
18 language Congress used. So Congress enacted these
19 programs for the benefit of mitigating against climate
20 change, for combating environmental injustice. And what
21 these executive orders and subsequent directives, and
22 you've seen this in the documents we've gotten from
23 defendants, show is there is specific targeting on those
24 concepts. So this isn't just a case of like, well, are we
25 going to reallocate the funding in a slightly different

1 way. This is we don't want to implement these
2 congressionally mandated programs.

3 **THE COURT:** And let me say this. I understand
4 it. I understand that the present administration doesn't
5 agree with all this. And they ought to go to Congress and
6 change the law.

7 **MS. HUNTER:** Right.

8 **THE COURT:** You know, that's their -- they don't
9 get to go unilaterally change an act of Congress. They
10 have -- the duty of the executive is to faithfully execute
11 the laws. And, you know, what we're talking about here is
12 who actually implemented these freezes? It was the
13 agency. OMB plainly does not have the authority to freeze
14 a grant. That is not OMB's -- whatever OMB told them,
15 they didn't have any authority to tell them. If they told
16 them, ignore the law, tough. The agencies don't have any
17 authority to follow an unauthorized act, right?

18 **MS. HUNTER:** That's correct, Your Honor. And
19 the last point I'll make on this, just to respond to, you
20 know, changing the law, this was money that was
21 specifically appropriated by Congress. So even if there's
22 a subsequent change in the law, the money that has been
23 specifically appropriated for specific purposes needs to
24 be distributed in compliance with that congressional
25 mandate.

1 **THE COURT:** But congress can amend its laws.
2 Congress could come back and amend its laws. There's a
3 process, if under the -- if a prior Congress adopted
4 something that the present Congress doesn't agree, it can
5 amend the law. That's the way the system works. And
6 perhaps some of your clients might be unhappy if they did
7 that. But they haven't done it, have they?

8 **MS. HUNTER:** They have not, Your Honor.

9 **THE COURT:** Yeah. Okay. Anything further
10 Ms. Hunter?

11 **MS. HUNTER:** Not on jurisdiction, Your Honor.

12 **THE COURT:** I do find, I guess there's no
13 mystery that I do find the Court has jurisdiction over
14 this matter. I think these claims are not contractual.
15 One is not in essence a contract. But even more
16 compelling, the remedy here would be completely inadequate
17 under the -- in the Court of Claims. This is a matter
18 properly before this Court. And the Court has
19 jurisdiction over these claims.

20 Now, let me turn if I might now to -- and we'll
21 issue an order in due course on the issue of jurisdiction.
22 I received yesterday a chart. Who is going to be
23 addressing the chart from the Government?

24 **MR. TIMMONS:** I will, Your Honor.

25 **THE COURT:** First of all, I commend you for this

1 work. It's very helpful actually. And it brought to me a
2 lot of clarification about what's going on here.

3 Before we go there, let me ask you. Does the
4 Government dispute -- I mean, do the plaintiffs dispute
5 any aspect of this chart?

6 **MS. HUNTER:** There is one error in this chart
7 that we've been able to determine, Your Honor. That is
8 the Alliance for Shenandoah is listed as having a grant
9 that is accessible to grantees. And that has not been the
10 experience of the Alliance for Shenandoah. They do not
11 have access to that grant.

12 **THE COURT:** So let me find that one. What page
13 is it on? Can you help me on that?

14 **MS. HUNTER:** It's on Page 2. It's third from
15 the bottom.

16 **THE COURT:** Okay. By the way, I am going to
17 have my law clerk hand out a chart which actually has a
18 remarkably complex designation 1 through 38 so we can
19 actually refer to these a little more easily.

20 So what number, Ms. Hunter, would this be? Is
21 it Number 15?

22 **MS. HUNTER:** Let me just take a look, I don't
23 know. Yes. It's 15. And just to be clear, not only have
24 they not been able to access it them themselves, they've
25 been told by the agency that they don't have access to

1 that grant.

2 **THE COURT:** Mr. Timmons, where did the
3 information come from that it was accessible?

4 **MR. TIMMONS:** It came from the agency.

5 **THE COURT:** Okay.

6 **MS. HUNTER:** The only other note I would make on
7 Grants 2 through 7 --

8 **THE COURT:** The terminations?

9 **MS. HUNTER:** Termination in progress, the
10 plaintiffs have not received any notification --

11 **THE COURT:** I think they're saying termination
12 in progress so they wouldn't have gotten that.

13 **MR. MILLER:** And, Your Honor, similarly on
14 No. 8, I think we actually don't understand the closed
15 designation. We understood those funds to be frozen
16 previously for the City of Madison, now says closed. I
17 don't know if that means terminated as well or in the
18 process of termination.

19 **THE COURT:** Mr. Timmons, do you have any idea
20 what that means? That was only used in that one grant.

21 **MR. TIMMONS:** I'll have to check on that and get
22 back to Your Honor.

23 **THE COURT:** Good. We'll do the same for the
24 No. 15 as well.

25 **MR. TIMMONS:** Yes, Your Honor.

1 **THE COURT:** Okay. So other than that,
2 Ms. Hunter, it appears that there are a number of your
3 clients who have had their grants restored; is that
4 correct?

5 **MS. HUNTER:** Well, these clients have had their
6 grants turned on, turned off, turned on, turned off.

7 **THE COURT:** I'm going to enter an order, by the
8 way, that orders none of those be frozen again or
9 terminated without further order of this Court. So we're
10 going to stop this yo-yo situation.

11 **MS. HUNTER:** Thank you, Your Honor. So yes, as
12 the current status as far as I can tell as of 9 a.m. this
13 morning, otherwise I think this is accurate.

14 **THE COURT:** Moving target here.

15 Okay. Mr. Timmons, let me ask you first about
16 these terminated cases, Number 9 through 12. Let me ask
17 you about those, first. And we'll start with the City of
18 New Haven. Why is that -- why is that -- why was that
19 grant terminated?

20 **MR. TIMMONS:** It's not consistent with agency
21 priorities.

22 **THE COURT:** Was it originally frozen like the
23 others?

24 **MR. TIMMONS:** I don't have that information in
25 front of me.

1 **THE COURT:** What's the agency priority we're
2 talking about?

3 **MR. TIMMONS:** It's consistency with the
4 priorities of the administration as expressed in the
5 executive orders.

6 **THE COURT:** But we've had this problem that the
7 agency priority might be they don't agree with a prior act
8 of Congress.

9 **MR. TIMMONS:** I would disagree with that. I do
10 think that the executive orders state the administration's
11 priorities in funding. I would disagree --

12 **THE COURT:** Let me ask you this, if the priority
13 of the administration would violate an act of Congress,
14 does the Executive Branch have the discretion to violate
15 an act of Congress?

16 **MR. TIMMONS:** No. And I believe these executive
17 orders are consistent with the congressional acts.

18 **THE COURT:** Okay. But if I concluded they
19 weren't, you would agree with me that would be ultra
20 vires?

21 **MR. TIMMONS:** Yes, Your Honor.

22 **THE COURT:** So you don't -- give me more detail
23 on the Electrify New Haven grant, City of New Haven,
24 Number 9. Other than what priority are we talking about?
25 What specifically in this grant makes it not an -- not a

1 priority of this administration?

2 **MR. TIMMONS:** I don't have that information in
3 front of me. So I would have to rest on the decisions
4 that the agency determined.

5 **THE COURT:** No, I'm not going to do that. I
6 asked -- you know, I asked for all documents relating to
7 freezing.

8 **MR. TIMMONS:** Right.

9 **THE COURT:** And I got an ocean of documents.
10 Thousands. And I can't say I have personally examined
11 every one of them. Have you examined every one of them?

12 **MR. TIMMONS:** No, Your Honor.

13 **THE COURT:** I don't know of anyone who could.
14 But my clerks have been very diligent. They spent a lot
15 of time this week looking at them. We couldn't find one
16 referring to any individual grantee. Did I miss
17 something?

18 **MR. TIMMONS:** I'm sure you didn't, Your Honor.

19 **THE COURT:** So that tends to suggest this was an
20 en masse freeze without individual consideration of the
21 grants. Does that seem like a fair reason?

22 **MR. TIMMONS:** I would say that at the pause was,
23 as you said, it was a broad pause base on funding. I do
24 think the terminations were done based on a review of the
25 grants.

1 **THE COURT:** And I think that's -- I think that's
2 fine. But you haven't given me any documents to show me
3 that, have you?

4 **MR. TIMMONS:** I don't have all the documents
5 that we would intend to present in this case.

6 **THE COURT:** I'm going to give you a chance to
7 present them because I'm going to have you present them in
8 the next week to me on every one of these grants which
9 have been terminated and which have been -- are
10 terminations in progress. I want to see the underlying
11 reasoning. You understand there's a problem if the action
12 is based on post hac reasoning. Do you understand that?

13 **MR. TIMMONS:** I do.

14 **THE COURT:** So I want to see what was the
15 reasoning behind it. What was the -- what was the stated
16 purpose. And you're telling me they made an individual
17 determination of why that grant should be terminated?
18 They've made an individualized determination, are you
19 telling me that?

20 **MR. TIMMONS:** I think the decision making in
21 this case is always going to be it's inconsistent with
22 priorities, and that it -- it's going to be -- it's going
23 to be the same reason for all of them, yes, Your Honor. I
24 mean, it's not going to be --

25 **THE COURT:** But that's not -- and what reason is

1 that? I mean, agency -- but if you just say it's
2 inconsistent with our priorities, if our priorities are
3 inconsistent with a statute, that's a problem, isn't it?

4 **MR. TIMMONS:** I think if the plaintiffs have
5 demonstrated that those priorities are inconsistent with
6 the statute, which is what I don't think they've done,
7 which is why I don't think they're entitled to an
8 injunction.

9 **THE COURT:** I hear what you're saying. But you
10 agree with me, if they were to prove that, they would have
11 a good point, would they not?

12 **MR. TIMMONS:** It depends on how many they prove
13 it for. Is it for all of these programs? Some of these
14 --

15 **THE COURT:** I'm just saying for any one they
16 approve, it was inconsistent. They would have a valid
17 point, would they not?

18 **MR. TIMMONS:** Yes, Your Honor.

19 **THE COURT:** Okay. And I could go through them
20 all. City of Baltimore, do you have any idea why they
21 terminated?

22 **MR. TIMMONS:** You're going to get the same
23 answer, Your Honor, for all of them as you suspect.

24 **THE COURT:** You don't know, do you?

25 **MR. TIMMONS:** I don't know, no.

1 **THE COURT:** CleanAIRE, you don't know, do you?
2 You don't know why they terminated it?

3 **MR. TIMMONS:** I know that they were all
4 terminated -- any terminations are going to be because
5 they're inconsistent with the policy.

6 **THE COURT:** Who told you that?

7 **MR. TIMMONS:** That's -- I'm fairly confident
8 saying that, Your Honor.

9 **THE COURT:** But tell me what gives you that
10 confidence. I don't have that confidence. So I want to
11 know, give me some confidence.

12 **MR. TIMMONS:** The letters that the EPA sent to
13 the plaintiffs, the ones that I've reviewed in the
14 terminations.

15 **THE COURT:** I've reviewed those letters. They
16 don't give a reason. I've got copies of them. It was
17 provided by the plaintiffs. It doesn't state a reason.
18 It lists possible reasons. Merit, fairness, excellence in
19 performing their duties. Do you have any evidence they
20 weren't performing their duties under the grant? I
21 haven't seen any evidence of that. I mean, maybe there
22 is. I mean, let me say this. If someone is not following
23 their grant properly or is committing waste, fraud, that's
24 another thing y'all listed, they should be terminated.
25 Don't you agree?

1 **MR. TIMMONS:** Yes, Your Honor.

2 **THE COURT:** I don't think plaintiffs would
3 disagree with that. That would be completely within the
4 discretion. But your letter -- and did I miss something?
5 I think they are a form letter, aren't they? I mean, all
6 of the four got exactly the same letter, did they not?

7 **MR. TIMMONS:** Like I said, Your Honor, the
8 termination reasons are going to be similar for all of
9 these cases.

10 **THE COURT:** Well, but I don't understand the
11 reason. To say it's a different priority does not answer
12 the question.

13 **MR. TIMMONS:** That is the explanation that the
14 agency gave. I can't offer you a different --

15 **THE COURT:** I'm going to give you another chance
16 to go back and get specific documents to show what that
17 means because that's not good enough. That is not good
18 enough. And I know they put you, Mr. Timmons, in a
19 difficult situation. They haven't given you that
20 information. And I don't want to give you a hard time
21 because you only got what you got, right?

22 **THE CLERK:** You're fine, Your Honor. I'm doing
23 just fine.

24 **THE COURT:** Good. Mr. Berlinsky is my friend
25 here. I don't want to pick on him too much either. But,

1 you know, I just -- the Government's going to have to do
2 better than say I trust an unnamed person who told me that
3 it was agency priority when that doesn't tell me anything
4 and there's a plausible read of that meaning from these
5 other documents that it was based on the IRA and IIJA.

6 So if there's another reason, you know, I want
7 to hear from them because the Government -- there are
8 reasons that grants could be terminated legitimately. But
9 you've got to -- you can't just -- you're not going to
10 have this Court on a boilerplate just accept some form
11 termination notice with no reason.

12 **MR. TIMMONS:** Understood.

13 **THE COURT:** Particularly when it appears to me
14 that the plaintiffs have made a very strong showing that
15 the freezes were unlawful. And it appears from this chart
16 that the Government has pivoted away from that. They're
17 flowing some. The only ones that aren't, we've got a
18 couple of DEI ones we'll talk about in a minute. But
19 other than that, y'all are either letting the money flow
20 or terminating them. Isn't that fair?

21 **MR. TIMMONS:** I think the idea with the pause
22 was to make decisions of whether to proceed with some and
23 terminate others.

24 **THE COURT:** Okay. Well, there have been a
25 number of courts that have found the pause itself

1 unlawful, correct?

2 **MR. TIMMONS:** There have been.

3 **THE COURT:** Yeah. Okay. You don't agree with
4 them and I respect that. You might not agree with that I
5 do.

6 Okay. So for all of these, the ones that have
7 been terminated, you have no idea why they're terminated,
8 correct?

9 **MR. TIMMONS:** I have no idea beyond what the
10 agencies have offered in the termination letters, no, Your
11 Honor.

12 **THE COURT:** Okay. And if I were to rely -- i
13 will tell you right now, you need to tell your clients
14 that isn't good enough. Okay? But we're going to give
15 them a chance to come forward with their specific
16 documents.

17 Is the same true for the six grants listed on --
18 at Numbers 2 through 7, the termination's in progress, you
19 don't really know why they're being terminated?

20 **MR. TIMMONS:** I don't know why they're being
21 terminated, especially the ones in progress. If they
22 haven't issued termination letters, I couldn't speculate
23 on the rationale. I think that would also -- you know,
24 we're not going to have a final agency action on that, I
25 mean, until we see what the decision the --

1 **THE COURT:** If it's derivative of an unlawful
2 freeze, you might already have an answer that might be
3 final. So the question is, I understand this, are the
4 grants frozen for these people?

5 **MR. TIMMONS:** I think they would be frozen, yes,
6 Your Honor.

7 **THE COURT:** Okay. Well, that's -- I think we --
8 there are plenty of authority out there that that's --

9 **MR. TIMMONS:** I understand that. I just, for
10 the Court, I just want to say, I can't -- I wouldn't feel
11 comfortable getting out in front of the agency and saying
12 what their reason is if they haven't issued their decision
13 on it yet.

14 **THE COURT:** I've got a hunch they might not
15 know. And how about towards the end here, Numbers 27
16 through 32, do you have any idea about those, why they are
17 being terminated?

18 **MR. TIMMONS:** Yes, Your Honor. Those are
19 Partnership for Climate-Smart Commodities Program. Those
20 are not funded through any of the sources that we've been
21 talking about today. That was a discretionary program
22 created by the Biden Administration funded separately.

23 **THE COURT:** Tell me about that. I don't know
24 about that. So give me a little more detail on that.

25 **MR. TIMMONS:** Yes, Your Honor. Give me one

1 second and let me pull that up. This was addressed in our
2 brief where we mentioned that -- we cited the report that
3 said that this program has considerable authority. And
4 it's not reliant on IRA funding, IIJA funding, or APA
5 funding. It was a fully discretionary program created by
6 the Secretary of Agriculture under the Biden
7 Administration. It's not funded by any of these sources
8 we're talking about today.

9 **THE COURT:** Okay. That's a good point. I'm
10 going to ask plaintiffs about that. That's a fair point.
11 That's a new -- I didn't pick that up before, so thank you
12 for that.

13 **MR. TIMMONS:** Yes. Your Honor, I guess the
14 clarification on that is the IRA appropriated funds for
15 the climate-related soil programs, but these grants are
16 under the partnerships for Climate-Smart Commodities
17 Program. That's not a program --

18 **THE COURT:** That's just not a part of the IRA or
19 the IIJA; is that correct?

20 **MR. TIMMONS:** No, Your Honor. It's not created
21 by Congress, that program.

22 **THE COURT:** Okay. Well, then that's an
23 interesting distinction. Thank you for that.

24 Talk to me about the DEI reference. Were
25 these -- there are three of them. Let's see if we can

1 find them here. I think they are -- I think 16, 22, and
2 23. What's the problem with the so-called DEI reference?

3 **MR. TIMMONS:** Yes, Your Honor. And I have to
4 caveat it with, you know, I have not investigated this
5 completely. But here's what I think is that the Rhode
6 Island case did not involve the DEI executive order and
7 that this grant also implicates that in addition to --

8 **THE COURT:** But what's the problem? I mean, I
9 understand -- I mean, was this frozen because of DEI? Or
10 was it also an IRA or IIJA appropriation that now people
11 are looking for another reason to freeze it? Which one is
12 it?

13 **MR. TIMMONS:** The way I interpret it is that it
14 is not compliant with the executive order on DEI issues
15 and that that is why.

16 **THE COURT:** But what was the original reason it
17 was frozen?

18 **MR. TIMMONS:** I would have to -- I don't have
19 that information right here. I'd have to look back and
20 see if I can find that.

21 **THE COURT:** You understand the problem with post
22 hoc justifications?

23 **MR. TIMMONS:** Yes, Your Honor. I mean, I would
24 look at the information that was provided, you know, at
25 the time. I just don't --

1 **THE COURT:** Yeah, I mean, I think we're going --
2 I'm going to ask for the documents and let's look at it.
3 But what is it about DEI, what is it specifically about
4 DEI that would make it appropriate to cancel these grants?
5 I'm just trying to understand. If they're funded by the
6 IIJA or the IRA, what is it -- what's the problem with the
7 grant?

8 **MR. TIMMONS:** So as the President explained in
9 the executive order, his concern is that the prior
10 administration funded hurtful practices under the name of
11 DEI.

12 **THE COURT:** But what are these hurtful
13 practices?

14 **MR. TIMMONS:** He feels that DEI programs that
15 favor parties over others are not fair. I mean, that's --

16 **THE COURT:** But is that part of these grants?
17 What are these grants doing that violates that principle?
18 I'm just trying to get to the bottom -- you know, there's
19 a lot of -- people go in and they throw a term around and
20 they think it's a loaded term and it means a lot. It
21 doesn't mean much to me. What did these grantees actually
22 do that violate that executive order?

23 **MR. TIMMONS:** And again, I don't think it's
24 anything the grantees did. I think it's the funding
25 priorities of President Biden's Administration are

1 different than the funding priorities of President
2 Trump's.

3 **THE COURT:** But there are definitely some parts
4 of the appropriations of Congress that relate to DEI
5 funding. I know the present administration doesn't agree
6 with that. I respect that. My question is do they have
7 the authority to unilaterally violate an act of Congress?
8 I've got to start with the thing of what's the problem?
9 Because it may well be it's completely unprotected
10 conduct.

11 **MR. TIMMONS:** Your Honor, I think we are not
12 arguing that any of these grants violated federal law,
13 violated the funding statutes. But we are saying that
14 President Trump would like to allocate these funds to
15 serve different purposes.

16 **THE COURT:** Well, he isn't allocating them so
17 right now we're just canceling them. And the indications
18 are they are just canceling or freezing. So I'm just
19 trying to get to the -- you're speculating that he might
20 want to allocate them.

21 **MR. TIMMONS:** Well, Your Honor --

22 **THE COURT:** What we need, Mr. Timmons, is a
23 little specification. We just need specification. And
24 then that will help me figure out what's this all about?
25 Speaking in code words, like priority, DEI, doesn't tell

1 us anything. And it may be that the administration's
2 actions are perfectly legitimate, authorized, within its
3 power. But you've got to give me something to show me
4 that.

5 **MR. TIMMONS:** Understood.

6 **THE COURT:** You hear what I'm saying? I'm not
7 going to respond to anybody's buzzwords, plaintiff or
8 defense.

9 **MR. TIMMONS:** And I don't mean to assert
10 buzzwords.

11 **THE COURT:** Well, it sounds that way because I
12 know you're being given marching orders. You're here.
13 You're not the Attorney General of the United States.
14 You're sent here to represent your client. I understand
15 that. And I don't want to give you too hard a time
16 because of that. But it's just not good enough to just
17 throw a word out and tell me, well, that ends the
18 discussion. It begins the discussion. And it may be that
19 the Government's view is perfectly legitimate. But you've
20 got to get there. And I'm not going to accept a buzzword
21 as the answer from either party.

22 **MR. TIMMONS:** Understood. Your Honor, if I may,
23 there's a couple points I would like to address? I do
24 think, you know, if we're going to talk about whether the
25 grants will be funded, whether they'll be terminated, I

1 think we need to just be fair to the public record and
2 what people have said on this. The EPA has a press
3 release. It was issue on April 10th. It says that
4 Administrator Zeldin is re-prioritizing EPA's commitment
5 to protecting human health and the environment. The Biden
6 Administration doled out billions of taxpayer dollars and
7 we're putting them --

8 **THE COURT:** You can give me -- I don't want to
9 hear politician's press releases. Really, I mean --

10 **MR. TIMMONS:** And I agree with that, Your Honor.
11 But we've repeatedly cited things that the President has
12 said, things that these agencies have said.

13 **THE COURT:** I haven't -- only thing I've cited
14 are orders. And I have avoided taking quotes from the New
15 York Times or some source.

16 **MR. TIMMONS:** I was about to quote the New York
17 Post so, I'll just not do that.

18 **THE COURT:** That's not, to me, a source, a legal
19 source of authority.

20 **MR. TIMMONS:** And I a hundred percent agree. I
21 just don't want the record to reflect that the
22 administration has not made comments about re-prioritizing
23 funding.

24 **THE COURT:** Listen, they've got it in these
25 termination letters, for instance. But they've got to do

1 more than that to tell me what that means. Because there
2 are ways that that can be applied to violate the law. And
3 there are ways it could be interpreted to be proper. And
4 that's what we've got to get to is to the bottom line of
5 all this. Do you hear what I'm saying?

6 **MR. TIMMONS:** Yes, Your Honor.

7 **THE COURT:** I'm not trying to make a final
8 decision.

9 Okay. Ms. Hunter, let me hear from you about
10 these various -- how do you view this chart, first of all?
11 Do you see some progress here?

12 **MS. HUNTER:** There's a little more clarity
13 perhaps, Your Honor. Certainly appreciate the defendants
14 putting it together. I think this is kind of what we had
15 been looking for from the outset was a little clarity of
16 the status.

17 **THE COURT:** But you've got to give them credit
18 that they have restored some of the funds, thirteen of the
19 38. Correct?

20 **MS. HUNTER:** So long as those remain accessible.

21 **THE COURT:** I'm going to handle that one. Okay?
22 We're not going to be in a yo-yo situation.

23 **MS. HUNTER:** Yes. Yes. We appreciate that. I
24 think what is striking to me, and I don't want to
25 speculate, Your Honor, but I think we want to distinguish

1 between individualized determinations, i.e., looking at a
2 particular program by a particular party and maybe they
3 are being wasteful or maybe they're not fulfilling the
4 terms. That's one type of individualized determination.
5 What I see here is, to the extent it's individualized,
6 it's at the grant program level. So, you know, when we
7 see the list of terminated grants --

8 **THE COURT:** Let me stop you here. If there is
9 money that Congress has appropriated, shall fund, and
10 they've taken that bucket and terminated it because they
11 don't agree with it, that's a problem.

12 **MS. HUNTER:** That's exactly what I was saying to
13 Your Honor.

14 **THE COURT:** I get that. And, you know, we've
15 been trying to sort through some of these documents,
16 trying to figure out a process. And, frankly, it's pretty
17 hard. Okay? It looks pretty chaotic to me. And -- but
18 we're now -- I mean, I view, at least in these 38 cases,
19 that's all, 38 grants, that the Government has pivoted
20 from blanket en masse freezes, unfreezing some and others
21 moving to termination. And for those, we need an
22 explanation. Because just calling something a termination
23 rather than a freeze does not make it legal.

24 **MS. HUNTER:** That's right, Your Honor. And I
25 think what is consuming --

1 **THE COURT:** Or does it make it illegal? We've
2 got to drill down here on what the facts are. And words
3 like change in -- words like change in priority and DEI
4 tell me nothing.

5 **MS. HUNTER:** Correct, Your Honor. I think, you
6 know, when we look at -- to answer the question you posed
7 to opposing counsel here, when you look at the terminated
8 grants, they are all environmental justice problem-solving
9 grants --

10 **THE COURT:** They are, all six of them are
11 environmental justice grants.

12 **MS. HUNTER:** And we also know that one of the,
13 quote, priorities listed in the executive order was to
14 eliminate mention of environmental justice. The problem
15 is is the statutory language expressly talks about
16 environmental justice.

17 **THE COURT:** You need to help me with that of
18 kind of connecting the dots. We've tried to get into
19 the -- I mean, these statutes are enormously complicated.
20 I'm sure you and your staff have really spent a lot of
21 time trying to put the jigsaw puzzle together.

22 But we're getting a little more specific here,
23 so I need some help understanding. If they're taking a
24 bucket called environmental justice, is that like
25 something specifically in the -- a statute directing it

1 shall be funded? Or is it -- Mr. Timmons said there were
2 certain grants that came from funds outside of that,
3 created -- that's, to me, a very different thing. And I
4 think if a new Secretary of Agriculture comes in and says
5 this is discretionary money and I want to spend it on
6 Project B instead of Project A, he probably has the
7 authority to do that. Because he's not violating an act
8 of Congress that we can tell.

9 Now, you may have other arguments about
10 constitutional and First Amendment or something. I'll be
11 honest with you, I don't find your First Amendment
12 argument very persuasive. The separation of powers is a
13 little bit stronger argument. But this is why we're --
14 what we've lacked here is a lack of specificity, right?
15 That's been one of the problems. And we're going to get
16 specific. I'm going to require that on these terminations
17 and proposed terminations, they're going to give me every
18 document related to these particular grantees.

19 And, Mr. Timmons, let me mention this. I have a
20 sense some of these agencies have tried to do a document
21 dump on me to wear us out on things completely irrelevant
22 to my request previously. And that's what happened here.
23 I got not one document -- I said give me everything about
24 these grantees, and I didn't get one document on the
25 grantees. I might have missed something out of the 9,000

1 y'all have produced, but I don't think so.

2 This time we're going to get very specific. I
3 only want them about these grantees. We're now down to a
4 limited number of terminations and proposed terminations.
5 And I want those documents. I don't want all this process
6 stuff. I don't want it. It's got to relate to these
7 grantees. What's the reason for the termination of these
8 grants or proposed terminations? I want to see it.

9 MS. HUNTER: Your Honor, if I may? And I can
10 get into answering sort of the distinguishing factors
11 between these different grant programs. But I don't want
12 us to lose sight of the APA claims, which are separate to
13 anything related to the statutory language. It is correct
14 in certain circumstances that a new administration can
15 come in, change priorities, and shift course.

16 THE COURT: Right. There's a regulation on
17 that.

18 MS. HUNTER: Right. And this is where we get
19 into Justice Roberts turning square corners. You have to
20 do so pursuant to certain procedures, which means you've
21 got to look at the reliance and trust of everybody who has
22 been depending on these grant programs. You have to have
23 a reasoned explanation. You have to have, you know, a
24 rational basis for making the change. And so I just think
25 it's really important that, yes, the statutory language is

1 relevant for the separation of powers issues. But you've
2 also got this whole other orderly process that usually
3 happens when there's a change in administration.

4 **THE COURT:** And, you know, if you unilaterally
5 freeze them, that might not do it. If you terminate and
6 give notice and an opportunity to be heard, that's sort of
7 squaring the corners.

8 **MS. HUNTER:** Well, if that termination decision
9 is based on a reasoned explanation, and you've considered
10 reliance and trust, which in all the documents I've
11 reviewed and even the rhetoric I see in the defendant's
12 briefs and elsewhere, there is no understanding of the way
13 that these plaintiffs and the public have relied on these
14 grant programs.

15 **THE COURT:** Have you found any document that
16 considered even who these grantees were?

17 **MS. HUNTER:** Not in any detail, no, Your Honor.

18 **THE COURT:** I think other than a termination
19 letter, I haven't seen the name of any grantee in it. And
20 they are obviously form letters.

21 **MS. HUNTER:** Correct, Your Honor. And in fact,
22 if the Court's asking for supplemental briefing, we can
23 certainly identify some documents we found in the record
24 that show the contrary. But also, many of our plaintiffs
25 have actual letters from their own grant supervisors

1 saying you're doing a great job, you're doing everything
2 we've asked for, you're in compliance, there's no problem
3 here. And so I think the record is very contrary to the
4 idea that there's, you know, specific, individualized
5 determinations that these grantees are not following --

6 **THE COURT:** That's why I said it appears that
7 the plaintiff's original claim here, which was there was
8 no individualized consideration, it was just mass -- en
9 masse termination, freezing of grants has merit. Maybe
10 the best evidence of it is is the response on the chart.
11 They are not doing that anymore. So they're moving on,
12 now trying to go to terminations on some of them. And
13 we've got to look at that process.

14 **MS. HUNTER:** Right. And I think what we're
15 seeing is rather than going grant by grant, they're going
16 grant program by grant program.

17 **THE COURT:** I think that's a good point. That's
18 why I'm going to ask for the underlying documents specific
19 to this. And then you're going to have a chance to tell
20 me why that -- if it is, then why there may be problems
21 with that, under the APA, under separation of powers, or
22 whatever there might be.

23 **MS. HUNTER:** Yes. Thank you, Your Honor. I can
24 touch briefly on the Climate-Smart Commodities.

25 **THE COURT:** Yeah, talk to me about that because

1 that one hit me cold.

2 **MS. HUNTER:** Yes. And it's been a little bit
3 confusing to us, Your Honor. It seems to have gotten
4 wrapped up in the generalized freeze, perhaps because
5 climate was included in the title. And so it's a little
6 opaque. And we would love more information from
7 defendants on this, how exactly the money flows into that
8 program. But certainly, it does seem this sort of larger
9 Green New Deal freeze is what precipitated the freeze of
10 those grants, and then, ultimately now, the termination of
11 those grants.

12 And again, I would just refer to the APA, that
13 that's not how this sort of mass freeze -- these are large
14 grants. These are grants that people have spent literally
15 a year putting together, a lot of work to organize
16 partners together, to work with different farmers. And so
17 to abruptly terminate or put kind of new conditions on
18 this grant at the very least requires the agency to go
19 through a process.

20 **THE COURT:** Have you seen any communication of
21 why these freezes have occurred, these ones they are
22 talking about that weren't under the IRA or the IIJA?

23 **MS. HUNTER:** These recipients recently received
24 a letter saying our new priority is to give a higher
25 percentage of this money directly to farmers. You can

1 come back and reorganize your grant. And that, you know,
2 that may be a legitimate practice going forward.

3 But again, for that to be APA compliant, there
4 needs to be, you know, is that even a possible thing to
5 do? How is that going to impact the farming community?
6 How is it going to impact everyone who's relied on these
7 grants for years?

8 And if you look at the statutory language, and
9 we can provide this to you, at a very basic level, this
10 money is about helping farmers all over the United States.
11 And what this change, abrupt change has done after, you
12 know, farmers have been relying on this funding and are
13 ready to go and have put all this ground work in is just
14 disruptive to farmers all across the country. So it's a
15 little different than the sort of exact opposite language
16 that's used in other sections related to the IRA. And
17 we'd be happy to provide more argumentation on that in
18 briefing.

19 **THE COURT:** Yeah. I think what we need to do is
20 have another round of document production, very specific.
21 And give y'all a chance to respond to that. And I think
22 we need to get back together again to talk about this with
23 a fuller record.

24 It just occurred to me as I'm -- you know,
25 5 o'clock, right before 5 the thing drops. And it just

1 occurred to me that the case was shifting, it was
2 changing. And part of it is I think you folks have had
3 some success. Okay? And not complete success, but
4 partial success. And it's become more manageable. And
5 it's going to become more manageable for the Government.
6 Folks like Mr. Timmons, who are just overwhelmed I'm sure
7 with all this, of trying to drill down on specific
8 explanations. There may be good ones. There may be good
9 explanations.

10 I mean, I'm curious about this whole -- I mean,
11 it does seem to me these ones in a discretionary account
12 of the Secretary of Agriculture seem to be different in
13 this case than the rest of them, you know. Doesn't mean
14 they did it right, but I'm just saying it's pretty
15 different. Okay? And the fact they may have gotten
16 thrown into the pot inadvertently because they weren't
17 funny folk, so be it, I mean. But --

18 **MS. HUNTER:** We would appreciate that
19 opportunity, Your Honor. I will just start, sympathy for
20 all of the attorneys in this case. But really the people
21 suffering here are the plaintiffs, who don't know from
22 day-to-day --

23 **THE COURT:** How about their clients? How about
24 their constituents?

25 **MS. HUNTER:** Right. Exactly. The communities

1 that they serve. And a lot of them already had to
2 furlough staff, or may be on the brink of having to lay
3 staff off, you know, aren't delivering these services to
4 their communities that they've promised. So the faster we
5 can get resolution and clarity for them --

6 **THE COURT:** Well, let me tell you something. I
7 am going to give them seven days to produce this new
8 information. And I want to give you a chance to respond
9 to it.

10 I've got to address this motion -- this motion
11 of the plaintiffs about the inadequacy of the privilege
12 log. And let me just say, let's make the Government jobs
13 easier. I'm only concerned about the ones where we're
14 having disputes. So it's only the USDA and EPA. Okay?
15 So you don't need to worry about supplementing the long on
16 the other agencies. That will narrow your burden a little
17 bit.

18 But this deliberation privilege, process
19 privilege is just not adequately described. I can't
20 figure it out. I mean, I've been looking at some of these
21 and trying to figure out what is it about -- is there
22 deliberation in there? I'm having trouble figuring that
23 out. So I think a little explanation, you may just say,
24 oh, I get it now.

25 And I've sampled them, Mr. Timmons. I have not

1 gone in and methodically looked at them all. But I don't
2 understand it. And plainly, the plaintiffs don't
3 understand it. And I've actually got the documents and I
4 can't understand it.

5 We will have the same situation where if any
6 document is asserted to be privileged, the privilege log
7 needs -- an adequate privilege log needs to be prepared
8 and documents need to be presented to me in camera so I
9 can review them to see if the privileges asserted have
10 legal validity.

11 And let me tell you sort of my long-term thought
12 here is, this is -- to the extent there's an APA issue
13 here, and there appears to be, we're going to need to sort
14 of follow the APA process. We're going to have to create
15 an administrative record, which we're I think a long way
16 towards doing already in this case.

17 And I want to kind of move on and get this thing
18 to the end. It's not -- it's getting a lot less
19 complicated. And so in fairly quick order, let's get to
20 the end of this. We're not talking about just preliminary
21 injunctions. We're talking about a judgment at the end,
22 which would be a final judgment of this Court. And then
23 everybody who -- anybody who is unhappy can appeal. How
24 about that? Does that make sense?

25 **MS. HUNTER:** Yes, Your Honor. The one thing I

1 would mention -- well, a couple of things. Several of the
2 plaintiffs are in sort of limbo situations where they're
3 not sure if they should be responding to an attempt to,
4 like, rewrite their grants, or change their grants. And
5 there may be certain deadlines running there. So if
6 there's a way -- and we can provide more information about
7 that. But holding some of those timelines in abeyance
8 could perhaps be helpful.

9 **THE COURT:** Yeah. I'm glad to consider it.
10 Make it in the form of a motion. Run it by the other
11 side, they might agree to it.

12 You know, I'm not planning to be the grants
13 officer for the United States. Okay? I'm not doing that.
14 I'm not going to get down to that level.

15 But, you know, we need not to sink the ship
16 before we're ready to sail. Right? We've got to make --
17 we've got to keep them in place. So I've tried to move
18 quickly on this.

19 And believe me, I have a lot of other things
20 going on on my docket. But I've tried to give priority.
21 And we're going to get you back here very soon. But I
22 want to give the chance for the Government to supplement.
23 And then I want to give you folks a very brief chance to
24 respond to it and give me additional information. Because
25 y'all have insights, just like Mr. Timmons shared with me

1 some insights.

2 And Mr. Timmons, let me say this. I do want,
3 like on this agriculture program, I want a little more
4 explanation on that if you could for me. These are the
5 programs where you're telling me it's not from the IRA or
6 the IIJA. I just need a little more understanding of
7 that, a little more background so I can understand the
8 nature of that funding, and maybe some explanation of how
9 it got caught up in all of this. And there may be a
10 perfectly logical reason for that.

11 **MR. TIMMONS:** Yes, Your Honor.

12 **THE COURT:** May be independent. It may just be
13 coincidental; that is, I do see a material difference
14 between doing something that is -- in which an agency does
15 not have discretion to one in which the agency does have
16 discretion. I mean, that's very different. And I hear
17 the plaintiff about APA protocols and cutting -- and
18 turning square corners. But they do seem in a sort of
19 fundamental way different to me.

20 Okay. Now --

21 **MS. HUNTER:** Your Honor, can I ask for one
22 further point of clarification?

23 **THE COURT:** You can make two if you'd like.

24 **MS. HUNTER:** Grants 37 and 38 --

25 **THE COURT:** Yeah, I was wondering about those.

1 **MS. HUNTER:** These are grants that were awarded
2 but, you know, the paperwork wasn't yet finalized. We
3 think our claims are broadly applicable to those grants,
4 too. But I just wanted to -- as we move forward, I just
5 wanted to check that they were in the area where
6 defendants would be providing additional information.

7 **THE COURT:** Okay. I'll add that. I had not.
8 Thank you for pointing that out.

9 **MR. MILLER:** Your Honor, that would also apply,
10 I believe, to Grant No. 1 as well.

11 **THE COURT:** I had that in a pack, the three of
12 them together. I think that's a good point. I had not
13 thought about it that way, but I do believe we need more
14 information on that.

15 **MR. TIMMONS:** So, Your Honor, I just want to
16 clarify. I mean, you'd initially said it was only
17 pertaining to two defendants. It's now back to all four
18 defendants that you want more information on?

19 **THE COURT:** No, no. Here's -- let me see if I
20 can -- make sure I got it right. First of all, I had not
21 thought about the DOT. I'll say that. So I am going to
22 ask you about the DOT for those, what's going on with
23 those grants. I need a little explanation why they're not
24 being -- they're grant under review. Have they made a
25 decision yet whether they're going to proceed or not?

1 **MR. TIMMONS:** No, Your Honor.

2 **THE COURT:** How do I deal with that? I mean,
3 it's in the process.

4 **MR. TIMMONS:** I mean, Your Honor, I would also
5 point out that for two of these programs, the Active
6 Transportation Infrastructure Investment Program and for
7 the Charging and Fueling Infrastructure Grant Program, we
8 don't have a plaintiff that has a grant agreement in
9 either one of those programs. And yet we're going to --
10 we're considering issues --

11 **THE COURT:** Hold on just a minute. How are they
12 listed? Why are they here if there's not a plaintiff?

13 **MR. TIMMONS:** There's a plaintiff that has a
14 notice of the funding award. But they have not negotiated
15 the terms with the Government to determine the grant
16 award.

17 **THE COURT:** So where are they? Explain to me
18 because I'm not very familiar with this grant process,
19 Mr. Timmons. Explain to me the stages and where these
20 particular plaintiffs are at.

21 **MR. TIMMONS:** They were awarded funding and then
22 they have not finalized the grant agreement. And the
23 agency has not, you know, established the terms and
24 conditions that's going to govern the grant.

25 **THE COURT:** But they've been granted the --

1 they've been awarded the grant?

2 **MR. TIMMONS:** Yeah, awarded the grant. But they
3 have not entered into a binding grant agreement or
4 finalized grant agreement. I'm not sure what the right
5 phrase is. I don't want to get --

6 **THE COURT:** Is that normally -- is there a
7 standard grant agreement?

8 **MR. TIMMONS:** No.

9 **THE COURT:** They vary?

10 **MR. TIMMONS:** I mean, yeah, they have to
11 negotiate things like payment terms, timing. Usually, the
12 grant agreements are going to have standard terms and
13 conditions you might expect in a government contract.

14 **THE COURT:** Yes, that's what I thought.

15 **MR. TIMMONS:** But in terms of negotiating the
16 details, that has not been done.

17 **THE COURT:** And do we know the reason it hasn't
18 been done, since it sounds like to me mostly ministerial?

19 **MR. TIMMONS:** Well, I mean, I guess I would say
20 it was awarded under the prior administration. The prior
21 administration did not negotiate the grant award with the
22 client either. So I guess the question would be for both
23 administrations why they didn't finalize that before now.

24 **THE COURT:** I'm involving an agency. These
25 administration things are not --

1 **MR. TIMMONS:** That's a fair point, Your Honor.
2 But I think the short answer is they just -- you know,
3 there's no legal obligation to access the funds now
4 pursuant to an injunction.

5 **THE COURT:** I agree with that. But if -- let me
6 ask you this. If the reason they haven't performed these
7 ministerial acts is because they don't agree with the
8 appropriations of Congress, would that be something I
9 should consider?

10 **MR. TIMMONS:** I guess I would disagree that
11 negotiating a contract is a ministerial act. I guess I
12 would put it that way.

13 **THE COURT:** But you told me it's already been
14 awarded, so let's get past that. If they decided not to
15 perform to finalize the contract because they disagree
16 with the funding of Congress, is that something I should
17 be concerned about?

18 **MR. TIMMONS:** Like, that situation, yes. But
19 because they don't finalize the funding because it's not
20 consistent with their priorities, that's a situation I
21 think --

22 **THE COURT:** Here we go back to that priority
23 thing. What does that mean? If the priority is I don't
24 like the act of Congress, that's a problem. If it's I
25 have the discretion and I have the right to make those

1 calls, I think you've got a point. So it's just a loaded
2 term. It doesn't mean anything to me. You've got to get
3 more specific to me.

4 **MR. TIMMONS:** I just think -- I just don't think
5 we can say that -- the record isn't there that they don't
6 like the act of Congress.

7 **THE COURT:** Oh, I disagree. There's a lot of
8 evidence of that. I think there's a lot of evidence.

9 **MR. TIMMONS:** Well, Your Honor, in two programs
10 we only have active grants. In the Urban and Community
11 Forestry Grant Program and the Climate Pollution Reduction
12 Grant, we only had active grants. So I just think the
13 idea that in all of these programs the administration is
14 hostile and will never fund grants in any of them --

15 **THE COURT:** Well, let me ask you this. Let's
16 say the IRA has 50 buckets of funds, different buckets.
17 And the new secretary of one of these agencies goes
18 through and says I like this bucket, but not this bucket.
19 I like this part of the law, but not this part of the law.
20 That's still violating the law for the bucket you don't
21 pick because you don't like the law. I mean, I tell
22 defendant -- criminal defendants all the time, you've got
23 to obey the law, right? All of it, not just part of it.
24 You've got to obey every part of it, right? It's pretty
25 good advice I give them, isn't it?

1 **MR. TIMMONS:** Yes, Your Honor.

2 **THE COURT:** Okay. I mean, that's what we're
3 doing here is you've got to obey. So it's no answer they
4 don't -- they're not hostile to every bucket. The
5 plaintiff says to me it's certain buckets they're focusing
6 on. Fine. Let's look at what the legal authority for
7 that is. And if it's something that's not left to the
8 discretion of the agency because Congress has mandated it,
9 that's one point. If it's discretionary, that's something
10 else.

11 You know, I'm just trying to be a neutral in
12 this, trying to uphold basic legal principles. But the
13 Government needs to do more. And, you know, I'm trying to
14 give you some tools to let you go back to your clients and
15 tell them what you need because they may have good answers
16 to these questions. No answers don't work.

17 **MR. TIMMONS:** Understood.

18 **THE COURT:** Okay. Ms. Hunter, anything further
19 from the plaintiff?

20 **MS. HUNTER:** The only thing I would say, you
21 indicated you weren't fully convinced by our First
22 Amendment concerns. I'd be happy talk about that more now
23 or at a later hearing.

24 **THE COURT:** Later. I've read them. Believe me,
25 I've been through this. I looked at it. I just don't

1 find it as persuasive as some of these other issues.

2 MS. HUNTER: I will just --

3 THE COURT: You don't have to bat a thousand to
4 win the batting championship.

5 MS. HUNTER: No, but I will just note that, you
6 know, Plaintiff Sustainability Institute, who is right
7 here in Charleston, and we sort of talked about in our
8 brief where they were asked to scrub their language and
9 talk about their work in a very different way that really
10 would be, you know, an affront to the community that they
11 serve, they are on the list that we got last night of
12 termination in progress.

13 THE COURT: Well, we're going to look at that
14 one. I kind of caught that one. I also found the list of
15 words you can't use anymore. It's a little bit of Alice
16 in Wonderland. Where did that document come from?

17 MS. HUNTER: That's an EPA document, Your Honor.

18 THE COURT: You know one of the words was women?

19 MS. HUNTER: I am very personally aware of that,
20 Your Honor.

21 THE COURT: You can't use the word women
22 anymore. Or equity. Can't use equity anymore.

23 MS. HUNTER: And so I note this because they
24 have been asked to provide this sanitized work plan. They
25 so far have refused to do so. Now, their grant is on a

1 list. And so as we're in this interim period, I just --
2 and we can, again, provide a suggestion for Your Honor.
3 But I don't --

4 THE COURT: But I want all those -- I'm
5 expecting on those communications you're talking about, I
6 expect to get them. If you may persuade me if that's the
7 problem there might be a First Amendment problem in that.

8 MS. HUNTER: Thank you, Your Honor.

9 THE COURT: I just haven't seen that kind of
10 evidence.

11 MS. HUNTER: That's all we're asking for, Your
12 Honor, is the ability to review the evidence and to
13 present our own evidence on that point.

14 THE COURT: And, you know, I just say to
15 everybody, let's, you know -- we've already found common
16 ground in about a third of these, you know. And perhaps
17 if everybody drills down, we can find more common ground
18 where we don't have to fight about everything. I always
19 say to the parties, keep talking to each other. You know,
20 we're all officers of the court. Right?

21 MR. TIMMONS: Yes, Your Honor.

22 MS. HUNTER: That's right, Your Honor. Thank
23 you.

24 THE COURT: Anything further?

25 MR. TIMMONS: Yes, Your Honor. I wanted to

1 clarify. I think we have -- you know, we have the
2 deadline accelerated to Friday. I was wondering if we
3 could make both of our assignments due --

4 **THE COURT:** Yeah, actually I had overlooked
5 telling you that I was going to extend everything out
6 seven days to give you more time on the privilege logs.

7 **MR. TIMMONS:** Thank you, Your Honor.

8 What's that? Well, then you ask him, Lee.

9 **THE COURT:** You're Gergel's buddy. You say it.

10 **MR. BERLINSKY:** I don't want to stand up just
11 for this one small detail, Your Honor. But we would
12 certainly ask for ten days rather than seven if we could
13 get it. You know, the daunting task that we had to
14 produce this many documents in --

15 **THE COURT:** I wouldn't think there are many
16 documents on these limited number of -- you know, I think
17 y'all overread my request. I asked you on specific
18 grants, tell me the grantees, you know, and tell me why
19 you froze them. And I can get a document. I got zero.
20 Nobody gave me -- the only documents I have seen with a
21 grantee's name is a termination letter the plaintiffs gave
22 me. Y'all have produced to me 9,000 documents without
23 mentioning one grantee. That's odd. Okay? So now, it
24 kind of proves the point the plaintiffs made about mass
25 freezes, which frankly, Mr. Timmons candidly acknowledged

1 that. So we're beyond that. We're now moved to other
2 things.

3 But you're asking me -- all I'm asking you to do
4 is go to these, what we now have is, what, 12 terminations
5 and a few DEI, and now these two DOT things, where we're
6 trying to figure out what's going on with that. And I
7 just want the ones about why these grants are being
8 terminated. I don't think that's such a great burden.

9 And I appreciate the burden y'all are under. I
10 really do. I've been there before. I get it. But we've
11 got a bunch of not for profits who are having to lay off
12 people, people going without pay, they're being burdened.
13 So seven days is fine.

14 **MR. BERLINSKY:** Thank you.

15 **THE COURT:** Anything further?

16 **MS. HUNTER:** If I could just clarify, Your
17 Honor? We're -- you're going to issue a written order on
18 jurisdiction?

19 **THE COURT:** I am.

20 **MS. HUNTER:** And the plaintiffs have the
21 opportunity to file a motion for some minimal interim
22 relief regarding deadlines?

23 **THE COURT:** You do. And I'm also going to order
24 the defendants on anyone who has been unfrozen, that they
25 cannot refreeze without further order of this Court.

1 **MS. HUNTER:** Thank you, Your Honor. That's all.

2 **THE COURT:** Very good.

3 This hearing is adjourned.

4 (WHEREUPON, court was adjourned at 11:28 AM)

5 ***

6 I certify that the foregoing is a correct transcript from
7 the record of proceedings in the above-entitled matter.

8 s/Karen E. Martin

4/23/2025

9 _____
Karen E. Martin, RMR, CRR

Date. _____

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

- - -

THE SUSTAINABILITY INSTITUTE, : 2: 25-cv-02152
et al. :

Plaintiffs, : May 19, 2025
versus : (Pages 1 - 54)
:

DONALD J. TRUMP, *in his* :
official capacity as President :
of the United States, et al. :

Defendants.

- - -

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE RICHARD M. GERGEL
UNITED STATES DISTRICT COURT JUDGE

- - -

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Proceedings recorded by mechanical stenography,
transcript produced by computer.

1 *(The following proceedings commenced at 10:00 a.m.)*

2 THE COURT: Good morning. Please be seated.

3 Good morning, everyone. This is matter of The
4 Sustainability Institute and others vs. Donald J. Trump and
5 others, 2: 25-2152.

6 Could counsel for the plaintiffs who will be speaking
7 identify for the record, please?

8 MS. HUNTER: Kimberley Hunter, for the plaintiffs,
9 your Honor.

10 THE COURT: Thank you.

11 And for the defense?

12 MR. TIMMONS: Yes, your Honor. Todd Timmons, on
13 behalf of the Department of Justice.

14 THE COURT: Very good.

15 MR. BERLINSKY: And Lee Berlinsky, on behalf of the
16 defendant. Thank you.

17 THE COURT: Okay. Let's talk a little bit about the
18 order of things today, as we will discuss. I first want to
19 discuss the issue of the defendants' response at Docket 153
20 that was filed on Friday, indicating that defendants no longer
21 contest the judgment on the merits of the APA claims. Those
22 are Dockets what -- Grants 1 through 26 and 33 through 38.
23 Those are 32 of the 38 grants the defendants say they no
24 longer contest.

25 We had a telephone conference on Friday, in which Mr.

1 Timmons confirmed my understanding from the filing, that
2 although the government defendants don't contest their
3 liability, they would seek a stay should the Court enter
4 relief in the form of injunctive relief.

5 Mr. Timmons, is that correct? Is that a correct
6 statement of the government's position?

7 MR. TIMMONS: Yes, your Honor.

8 THE COURT: Very good. Okay. And after we deal with
9 that claim, I then want to address the plaintiffs' claim for
10 nonstatutory review jurisdiction, and then the implications of
11 that, if there is jurisdiction.

12 And finally, I want to address, after that, the
13 plaintiffs' claims which are still contested by the
14 government. Those are Grants 27 to 32. So, we'll do it in
15 that order so we can keep some rational line drawing here on
16 the issues.

17 So, let me say that I am prepared -- based on the
18 government's position expressed in Docket 153, I'm going to
19 enter judgment for the plaintiffs on Grants 1 through 26 and
20 33 through 38. And then the issue of remedy arises. And I'll
21 be glad to hear from plaintiffs regarding remedy.

22 MS. HUNTER: Thank you, your Honor. And if I could
23 first just ask for a point of clarification. Will you be --

24 THE COURT: You can ask for two points of
25 clarification.

1 MS. HUNTER: Thank you. Do you intend to enter
2 judgment -- final judgment, or is this just judgment as to the
3 preliminary injunction?

4 THE COURT: No, no. I'm going to enter final
5 judgment.

6 MS. HUNTER: Thank you, your Honor.

7 THE COURT: It would go up on appeal as a final
8 judgment. So, the question is: What remedies -- and
9 specifically, you know, as I understand the government's
10 position, they don't object to a declaratory relief, they just
11 don't want injunctive relief. And so, the question is -- I
12 want to address the appropriateness of any injunctive relief,
13 what relief you seek, and then I guess you ought to take up
14 the issue of whether or not a stay should be issued.

15 MS. HUNTER: Yes. Thank you, your Honor. Well, I
16 think we would request the relief that is outlined in our
17 prayer for relief in our complaint -- and that starts on page
18 89 of our complaint -- and starts with a series of declaratory
19 judgments. The first three declaratory judgments relate to
20 the executive orders, the unleashing Energy Executive Order,
21 the Equity Executive Order, and the DOGE Executive Order.
22 Those are the constitutional questions, and so, those may be
23 more appropriate in the second part of the process --

24 THE COURT: Well, the APA covers unlawful,
25 unconstitutional acts. So, it's appropriate with either or

1 both. And let me ask you this: You have an executive order
2 that I think on the unleashing the energy could be read
3 potentially to be limited to the New Green Deal, okay.

4 MS. HUNTER: (Affirmative nod).

5 THE COURT: And then their OMB memoranda that are
6 sent to every agency, not just to those in which the New Green
7 Deal might be -- so-called New Green Deal might be applicable.
8 And then from there flows agency memoranda, which say
9 everything to do with the IRA or the IIJA stop, right?

10 MS. HUNTER: That's right, your Honor.

11 THE COURT: And for the APA, its agency action that
12 may be unconstitutional -- though I'm not sure what the
13 President's intent was -- the actual implementation is broader
14 than the executive order. There could even be an argument --
15 I think one judge referenced that it might have been ultra
16 vires even from the President's instructions. But whether it
17 is or not is somewhat academic, that is: What is the
18 authority to violate statutes of the United States? I mean,
19 there can't be -- you know, there was an argument about, well,
20 it was an exercise of discretion. There's no discretion to
21 violate the law. That's not one of the options for executive
22 officers. They have to a duty to faithfully execute the laws,
23 right?

24 MS. HUNTER: Yes, your Honor.

25 THE COURT: And so, I'm just sort of wondering who do

1 you target here, because actual -- your clients' injuries flow
2 directly from agency action. And, of course, we're now
3 talking about the APA.

4 MS. HUNTER: Yep.

5 THE COURT: You know what I'm saying?

6 MS. HUNTER: Yes.

7 THE COURT: So --

8 MS. HUNTER: Well, I think defendants have maybe made
9 that a little bit easy for us with their filing -- not the
10 most recent filing, the filing prior to that -- in which they
11 outlined in declaration testimony exactly how these freezes
12 and terminations took place. And so, for the EPA grants,
13 there's a declaration from Mr. Travis Voyles, which outlines
14 that on February 25th, he made the decision as an executive
15 officer to terminate a set of grant programs.

16 THE COURT: How many did he terminate?

17 MS. HUNTER: It's the set of grant programs, so I
18 don't know how many individual grants. But there were --

19 THE COURT: But he says he did individual grant
20 reviews. How many individual grant reviews did this man do?
21 He didn't leave a paper trail, for one. We know there are a
22 number of them of our plaintiffs, but those weren't the only
23 ones he reviewed. This lawsuit had not even been filed yet.

24 MS. HUNTER: That's right, your Honor. But there's
25 no evidence in the record that he did do any individualized

1 grant reviews.

2 THE COURT: But he said he did.

3 MS. HUNTER: He said he did. And I know your Honor
4 has asked for those documents. And we have asked for those
5 documents and we haven't received anything to suggest that at
6 any point, he --

7 THE COURT: Well, in other cases -- y'all have gotten
8 a little ahead of the game here. In other cases, they just
9 come in and argue and there's no record, so you have to sort
10 of take them for what say. You know, I'm used to looking for
11 evidence, you know. So, when they told me initially that this
12 was the exercise of government and all that, I said, well,
13 show me the documents. They sent me a truckload full of
14 documents, ultimately thousands. Not one of them showed any
15 individualized concession review of consideration or anything
16 regarding these grants.

17 And then they told me, Well, you know, we're now sort
18 of pivoting over to terminations. I said, Well, show me the
19 evidence of individualized -- I said it was represented to me
20 that they were individualized terminations. So, I said, give
21 me those. And I got 500 documents. Still no evidence of any
22 individualized --

23 MS. HUNTER: And I think part of the problem here
24 might be that we're using "individualized" in different ways.

25 THE COURT: No. I think it's very understandable

1 what it means. Others may have interpreted it to change the
2 meaning of words. There's a lot of funniness about words
3 these days. But, you know, everybody understands what we're
4 talking about, and that is an individual grant recipient had
5 his or her -- or its grants reviewed, and there is just no
6 record evidence of it.

7 So, it goes back, Ms. Hunter, from the beginning
8 here, my point is, the APA challenges agency action. And I
9 kind of, like -- you know, you may want me to strike some
10 executive order or some OMB memo that's probably ultra vires
11 and all that. But I don't need to reach things I don't need
12 to reach. You've got, as you allege, unlawful agency action.
13 The defendant no longer contests them. So, the question is:
14 In light of that -- you know, generally, I try to not do more
15 than I have to, right?

16 MS. HUNTER: (Affirmative nod.)

17 THE COURT: And so, it seems to me that we have a
18 number of agency actions here which are not contested. So,
19 here's my real question -- not so much what exactly is
20 declaratory. I can figure that out about declaratory relief.
21 What injunctive relief do you seek? Because this is
22 apparently what the defendants object to.

23 MS. HUNTER: Yes, your Honor.

24 And I think if we look at that declaration of Mr.
25 Voyles, just focusing on EPA for the time being, he says: On

1 February 25th, I conducted an individualized review of EPA
2 grant programs -- that's his use of the word "individualized"
3 -- for consistencies with agency policy priorities. That day
4 I decided that certain grant programs should be terminated for
5 policy reasons.

6 And so, I think that and the actions that flow from
7 that decision is an executive action where you can issue both
8 a declaratory judgment that that action was arbitrary and
9 capricious, and also hold unlawful and set aside that action
10 and the actions that stem from it, pursuant to 5 U.S.C. 706.

11 THE COURT: So, I enjoin it. And then what happens?

12 MS. HUNTER: If you enjoin that action, then
13 everything which stems from that, which is the subsequent
14 termination of grants within those grant programs, would be
15 unlawful, and those grant programs would need to be
16 reinstated.

17 THE COURT: And we have some which are just paused
18 right now, and some are frozen. You want me to direct that
19 those grant funds be -- that the grant be reinstated,
20 basically?

21 MS. HUNTER: Yes, your Honor.

22 THE COURT: And as a consequence, the funds would
23 flow from there?

24 MS. HUNTER: That's exactly right, your Honor.

25 THE COURT: Okay. Whether it's called "termination"

1 or "freeze" or "pause" or whatever, it doesn't really matter,
2 you want the grants to function again.

3 MS. HUNTER: (Affirmative nod.)

4 THE COURT: What are the arguments that I should stay
5 this?

6 MS. HUNTER: Well, defendants haven't made any
7 argument for --

8 THE COURT: Well, I'm looking for -- maybe we ought
9 to wait and let them argue. You know, it's a different
10 standard when a plaintiff argues for preliminary injunction,
11 such as I presume you will for the nonstatutory review --
12 that's the *Winter* standard, right, the *Winter* standard -- for
13 once you have a judgment, which you will have, it's the *Nken*
14 standard, which is almost the opposite, right? The burden is
15 not on the plaintiff anymore, it's on the government.

16 MS. HUNTER: Correct, your Honor.

17 THE COURT: And the government has to say -- among
18 other things, has to have a finding that is likely to be
19 successful on review, right?

20 MS. HUNTER: That's right, your Honor, which would
21 seem sort of impossible here, given that they are conceding to
22 the merits --

23 THE COURT: Well, they argue that this Court doesn't
24 have jurisdiction. I've addressed that issue. But if I had a
25 view that the defendants were likely to be successful, I would

1 not have issued the order, right?

2 MS. HUNTER: That's right, your Honor.

3 THE COURT: It's a little bit -- you know, I think
4 that review anticipates, like, a jury verdict that the Judge
5 has doubts about, something like that.

6 MS. HUNTER: (Affirmative nod.)

7 THE COURT: I believe the Court's judgment regarding
8 jurisdiction was correct, so they won't meet that standard.

9 How about their irreparable injury? They have to
10 show that the non-prevailing party is irreparably injured.
11 What's the evidence of irreparable injury of the government if
12 the grants previously rewarded were reinstated?

13 MS. HUNTER: I can't see any irreparable injury
14 there, your Honor. Congress has appropriated this money for a
15 particular purpose. And so, all that the agencies need to do
16 is faithfully execute the law that Congress has passed. So,
17 there's no injury to the defendants. There's certainly
18 significant injury to the --

19 THE COURT: Well, that's another *Nken* factor, isn't
20 it? And that's the issue of whether there is any substantial
21 injury of the plaintiffs. Those 32 grant recipients in which
22 the grants are no longer contested, tell me about their injury
23 that they would suffer if I were to delay relief while
24 appellate review occurred.

25 MS. HUNTER: Yes. Thank you, your Honor.

1 Well, you know, we filed this motion for preliminary
2 injunction almost two months ago, and at that point, set out
3 in declaration testimony all the irreparable harm that our
4 plaintiffs --

5 THE COURT: I'll bet it hasn't gotten better.

6 MS. HUNTER: It has not gotten better. You know, for
7 some, it has gotten better. As we know, some of the grants
8 have been reinstated. And so, for those, it has gotten
9 better. Although, I would note that even those plaintiffs who
10 have had grants temporarily reinstated are still suffering a
11 lot of harm because they're not able to make those long-term
12 decisions they would want to make.

13 I think another really important point to note here
14 is that a lot of these grant programs have a three-year term
15 that is statutory and cannot be extended. And so, any delay
16 is really crunching the time that they are able to get this
17 work done and to align with the grant agreements which they
18 have agreed to. And so, every single day --

19 THE COURT: Now, I agree with you, it's been two
20 months since you filed the suit. But getting from filing to
21 judgment in two months is pretty good work.

22 MS. HUNTER: Yes, your Honor. And we really
23 appreciate the time and attention that you have taken to move
24 us along in this case. That being said, it's still every
25 single day we are getting calls from our plaintiffs and from

1 the communities that they serve --

2 THE COURT: Are staff furloughs occurring?

3 MS. HUNTER: Yes, staff furloughs are occurring. In
4 fact, even some staff have had to be laid off. Other groups
5 have had to hold off on staffs that they really need to hire
6 in order to accomplish the grant programs.

7 THE COURT: Time is not their friend.

8 MS. HUNTER: That's correct, your Honor.

9 THE COURT: Okay. How about the public interest?

10 MS. HUNTER: The public interest here seems very
11 clear. Two main points: One, this is what Congress intended.
12 Congress presented these grant programs to be in the broad
13 public interest and set in place a process for distributing
14 these funds, which the prior Administration then pursued. It
15 was a complicated process where they really made sure that
16 everyone went through an application process, and we put the
17 absolute best grant programs in place. So, that whole process
18 of government has been abandoned. But then probably more
19 importantly, these are all programs that are serving
20 communities on the ground with very substantial needs,
21 including right here in North Charleston.

22 THE COURT: Talk to me about The Sustainability
23 Institute. I don't know much about them. Tell me about them.

24 MS. HUNTER: Well, this is a group that's been
25 focused on affordable housing and community cohesion and also

1 climate resilience in the Charleston area for over a decade
2 and applied for this grant in particular to focus on a
3 neighborhood that had been previously impacted by a highway
4 exit. And so, it's a really wonderful grant program that
5 combines both environmental justice, which I guess we are no
6 longer allowed to say anymore, but --

7 THE COURT: You can say it in my Court.

8 MS. HUNTER: -- you know, benefit to a community
9 that's really suffered long-standing harm because of previous
10 government actions and historic systemic racism. But it's
11 also focused on the future and climate resilience and putting
12 in place weatherization for houses, so that that community can
13 become more cohesive and more resilient over time.

14 THE COURT: And also, I think for energy efficiency.

15 MS. HUNTER: Exactly.

16 THE COURT: And consequences of lack of efficiency.

17 MS. HUNTER: That's exactly right, your Honor.

18 THE COURT: Well, why can't the Administration -- new
19 Administration -- elections have consequences -- just come in
20 and say, Well, we don't really like these acts and we've just
21 decided we're not going to spend the money, we think it's in
22 the public's interest? Why can't they do that?

23 MS. HUNTER: Well, they certainly can't come in and
24 say we're not going to spend the money. That would be the
25 very definition of a violation of separation of powers. You

1 know, Congress has the power of the purse, not the Executive.
2 But even to the extent they wanted to spend the money
3 differently, they can't --

4 THE COURT: There's no evidence of that.

5 MS. HUNTER: There's absolutely no evidence of that.
6 That's right.

7 THE COURT: They've just cancelled the grants.

8 MS. HUNTER: They've just cancelled the grants. And
9 there's no evidence that we have seen, or that the defendants
10 have presented, that there is any process in place to
11 reallocate that funding.

12 THE COURT: Is there any public interest in upholding
13 our form of government of separation of powers that the
14 Executive faithfully execute the laws of Congress?

15 MS. HUNTER: Absolutely, your Honor. There is a
16 reason that we have these laws in place, both the APA and
17 these constitutional safeguards, and that is exactly so that
18 every four years we don't have kind of a whiplash of change
19 and complete disregard from both the prior Administration and
20 Congress. We have limited powers for the Executive, extensive
21 powers but limited powers. And that has been, you know, our
22 system of government for over a century.

23 THE COURT: Should a new Administration come in after
24 this one, of a different party or a different approach, they
25 may be similarly disadvantaged by having to implement

1 congressional acts they may not agree with until Congress has
2 the wisdom to change it, correct?

3 MS. HUNTER: Yes. And this is a normal thing that
4 happens in government. And, you know, courts -- to the extent
5 any administration has tried this type of thing before, courts
6 have been very clear that it's improper.

7 THE COURT: Let me hear from Mr. Timmons on the issue
8 of the request for a stay. Glad to hear from you on that.

9 MR. TIMMONS: Yes, sir, your Honor. Happy to be
10 here. The government's position is that the likelihood of
11 success factor weighs heavily in a stay. We understand
12 your Honor disagrees with our position on jurisdiction.

13 THE COURT: You're not going to persuade me on that
14 because I've reached --

15 MR. TIMMONS: No, I'm not.

16 THE COURT: So, tell me what other reason. You've
17 conceded liability on the APA. What other basis would there
18 be to say that there's not likelihood of success?

19 MR. TIMMONS: Well, we look at how the Fourth Circuit
20 has handled stay requests that have come up to them. And in
21 both cases that I'm aware, in grant funding cases, the Fourth
22 Circuit has said that the relief should be stayed pending --

23 THE COURT: But those are preliminary injunctions,
24 aren't they?

25 MR. TIMMONS: Yes, your Honor.

1 THE COURT: This is a judgment. You know, this is --
2 the government defendants will be found liable. They have
3 violated the rights of the plaintiffs.

4 MR. TIMMONS: But the issue is --

5 THE COURT: And there's nothing more basic, that
6 every plaintiff suffering injury has a right to relief,
7 correct?

8 MR. TIMMONS: If the Court has jurisdiction to order
9 it.

10 THE COURT: Of course. I have to have jurisdiction.
11 And you get to argue that. But the question is -- you are
12 familiar with the *Nken* standards, correct?

13 MR. TIMMONS: Yes, your Honor.

14 THE COURT: Okay. So, if you can't persuade me -- is
15 there any other reason the plaintiffs aren't likely to have
16 success other than your argument about jurisdiction, which I
17 have already rejected? Any other reason?

18 MR. TIMMONS: Your Honor, I just got to wrestle with
19 the fact that Fourth Circuit has looked at it twice and in
20 both cases has stayed the relief that your Honor is
21 considering granting.

22 THE COURT: They have not considered it because they
23 haven't had a judgment yet, have they?

24 MR. TIMMONS: Well, the issue is whether the relief
25 should be stayed pending appeal, which would be exactly the

1 same issue.

2 THE COURT: And you're going to have every chance to
3 argue that. You know, you're not the first lawyer to tell me
4 that they're going to race to the Fourth Circuit. And I just
5 say: Have at it. You know, that doesn't have the slightest
6 impact on me. I believe that the Fourth Circuit has
7 consistently upheld the concept that injured parties should
8 have remedies. And that's all they're asking for here. We're
9 not at a preliminary injunction stage. We are at the end of
10 the case, right?

11 MR. TIMMONS: Right.

12 THE COURT: End of the case. And you readily concede
13 that you don't contest the liability under the APA, you simply
14 argue that the APA is not enforceable in my court. Is that
15 correct?

16 MR. TIMMONS: Yes, your Honor.

17 THE COURT: And you think they ought to go to the
18 Court of Claims, correct?

19 MR. TIMMONS: As to those 32, yes, your Honor.

20 THE COURT: I respectfully disagree with you. I've
21 laid out a lengthy order why I say that. Are there any other
22 reasons other than you think the Fourth Circuit will agree
23 with you? Any other reason?

24 MR. TIMMONS: Your Honor, I hope I didn't suggest
25 that I was, like, threatening to take you to the Fourth

1 Circuit. I just -- you have to understand --

2 THE COURT: You can't threaten me in a way that would
3 matter anyway, so don't worry.

4 MR. TIMMONS: Okay. I mean, I just wanted -- the
5 government -- they're going to push the jurisdictional
6 argument, we're going to push it until it's resolved.

7 THE COURT: It's okay.

8 MR. TIMMONS: Okay. I just didn't want you to think
9 I was, you know --

10 THE COURT: You're ok. I don't know if I told you
11 this story -- I think I did, so I'll probably sound like an
12 old man repeating himself. But I used to practice in front of
13 Judge Hemphill up in Rock Hill. And he was a former
14 congressman; very irascible guy, served during the New Deal.
15 And he had a roadmap up on his wall in his courtroom, which
16 seemed a very odd place to put a highway map. And one day
17 somebody did exactly what you did to me: I'm going to take it
18 to the Fourth Circuit. And Judge Hemphill pointed over to the
19 map and he said: That's the road to Richmond. So, I guess he
20 had had it himself. I always thought that was a pretty cool
21 response. So, I think you'll probably fly to Richmond --
22 won't take the road anymore. But, have at it. And, you know,
23 if the Fourth Circuit doesn't agree with me, they have a --
24 they know how to reverse me.

25 MR. TIMMONS: Well, your Honor, we do think that

1 there is irreparable harm to the government.

2 THE COURT: Tell me about irreparable harm.

3 MR. TIMMONS: Well, if the money -- you know, if the
4 Fourth Circuit or the Supreme Court ultimately decides that
5 this Court did not have jurisdiction over the case and there's
6 been an order to expend funds on projects, then the money has
7 been spent, it cannot be appropriated for any other purpose.
8 The government has --

9 THE COURT: Why can't you -- can you seek to have it
10 returned?

11 MR. TIMMONS: Well, I'm not sure. I'd have to look
12 at the procedures for that. But I don't think -- I think the
13 plaintiffs would say: We had a court order saying we could
14 spend it, so we're not going to return the money.

15 THE COURT: And you have courts -- the point is, you
16 don't have anything in the record that they aren't capable of
17 paying it back, do you?

18 MR. TIMMONS: In the record, no, your Honor.

19 THE COURT: I don't have any other way to do things
20 other than what's in the record.

21 MR. TIMMONS: Uh-huh.

22 THE COURT: What else? Any other arguments why I
23 should not provide the parties relief at the time I issue
24 judgment?

25 MR. TIMMONS: I think the public interest in the -- I

1 mean, the elected representatives of the people being able to
2 carry out their policy priorities is a public interest.

3 THE COURT: You mean Congress?

4 MR. TIMMONS: Well, and the President, who has
5 discretion to --

6 THE COURT: Well, I know. But the President doesn't
7 have the discretion to break the law, does he?

8 MR. TIMMONS: Of course not, your Honor.

9 THE COURT: He has the duty to faithfully execute the
10 laws, correct?

11 MR. TIMMONS: Right. But I think there is a public
12 interest in having the proper balance between the Executive
13 and Congress laid out.

14 THE COURT: And where does that balance lie? That is
15 the issue and why we're in the third branch talking about the
16 prerogatives of the first and second branch, right?

17 MR. TIMMONS: Yes.

18 THE COURT: Sounds like *Marbury v. Madison* to me. I
19 mean, you know, it's why we're here. And it's the
20 Constitution we're having to address. And it just seems to me
21 that the public interest lies most directly in upholding our
22 form of government. It seems simply that. And you do not
23 contest that, if the APA applies, that the plaintiffs are
24 entitled to relief. What that means is their claim is based
25 on the fact that the Executive acted in excess of authority,

1 that these agency heads acted in excess of their authority,
2 without authority, ultra vires, and in violation of the
3 constitution. I mean, that's the basis of their claim.

4 So, I will enter judgment today. And I will enter
5 judgment with injunctive relief.

6 So, let's move on to the issue of the --

7 MS. HUNTER: Your Honor, can I make one minor point?

8 THE COURT: You don't want to buy it back, Ms.
9 Hunter.

10 MS. HUNTER: I think this leads into what you're
11 saying. But, you know, the defendants here are saying, well,
12 the Fourth Circuit or the Supreme Court may tell us we need to
13 go to the Court of Federal Claims. But even if that were the
14 case, which it is not, your Honor, presumably, the Court of
15 Federal Claims under that argument would have jurisdiction to
16 hear our APA claims, and then they would enter judgment. So,
17 there's no future here where the government needs to get its
18 money back. So, I think that eliminates any irreparable harm
19 for the government here, your Honor.

20 THE COURT: You mean having not contested it here, it
21 would be harder to go somewhere else and contest the very same
22 claim?

23 MS. HUNTER: Yes, your Honor.

24 MR. TIMMONS: And, your Honor, of course, I would
25 just say that is not what the government -- that's not the

1 position we would take in the Court of Federal Claims. That
2 we concede -- our not disputing an APA claim in district court
3 is very much different than not disputing a contract claim in
4 the Court of Federal Claims.

5 THE COURT: I don't think you're going to have an
6 opportunity to argue that, so I'm not going to get into it
7 with you. I think it would be a very difficult position to
8 take. But that doesn't -- I don't think you're going to get
9 there because I think we have jurisdiction right where we are.

10 Let's move on to the issue of the nonstatutory
11 review. You know, the issue of jurisdiction of this Court
12 over unconstitutional conduct of the Executive branch is not
13 an issue we address every day. In fact, it's not an issue
14 that -- it has only come to me in a damages claim, like
15 *Bivens*. This is not a *Bivens* claim. This is an effort for
16 equitable relief.

17 And Ms. Hunter urged me on our telephone conference
18 on Friday to take a look at *Strickland* and these other cases,
19 which, frankly, I haven't paid a lot of -- I've been focused
20 -- we've all focused our attention on the APA jurisdictional
21 issues. Appropriately so, the government had its arguments,
22 and the plaintiffs had theirs. But I now turn my attention to
23 that issue.

24 And, you know, what I've come to realize in reading
25 *Strickland*, which I read at the time it came out, but it

1 didn't seem the importance to it, to me, that it is now. It
2 plainly holds that a district court has authority under
3 several different theories, just inherent authority. There
4 are certain cases that are considered exceptions to sovereign
5 immunity. There are several different theories, all which are
6 laid out in *Strickland*.

7 And the Fourth Circuit mentioned an amicus brief by
8 Professor Chemerinsky, favorably quoting it in the order. So,
9 of course, I went and read it. I know Professor Chemerinsky
10 -- now Dean Chemerinsky -- very well. He speaks to the Fourth
11 Circuit and the district judges frequently. We know him well.
12 And he makes a quite persuasive argument of the history of
13 this theory, dating back -- here we go again, *Marbury v.*
14 *Madison*, and quotes *Youngstown Steel*, a number of the *INS*
15 cases, cases involving -- some of the terrorist cases in the
16 Bush Administration. He cites a number of cases. But the
17 clearest expression of it is in *Strickland*. And in Judge
18 Gregory's concurring opinion in an immigration case -- I think
19 it was a religious-ban case -- he also sets forth -- he was
20 then, I think, chief judge -- this whole theory.

21 So, let's lay it out, first, Ms. Hunter. And then I
22 want to hear from the government about jurisdiction for
23 nonstatutory review.

24 MS. HUNTER: Yes, your Honor. So, essentially, you
25 know, this is different than a *Bivens* action, because this

1 type of jurisdiction is focused only on declaratory or
2 injunctive relief. And it's focused on --

3 THE COURT: By the way, that's the only thing I'm
4 giving you --

5 MS. HUNTER: Yes.

6 THE COURT: -- in the first judgment. You're not
7 getting damages.

8 MS. HUNTER: And we're not asking for damages.

9 THE COURT: You're not asking and you're not getting.

10 MS. HUNTER: So, just clarifying how this is a little
11 bit different than *Bivens*. But it's similar in that it
12 relates to the acts of federal officials and essentially says
13 that when federal officials are acting in excess of their
14 constitutional or statutory authority, the Court has
15 jurisdiction to hear claims from plaintiffs withstanding in
16 jurisdiction to issue declaratory relief.

17 If I could step back a little bit and talk about why
18 we believe it's really important that you do rule on these
19 particular claims, which are Counts 1 and 2 in our
20 complaint --

21 THE COURT: But your APA count is actually Count 3.

22 MS. HUNTER: That's correct, your Honor. These first
23 two are -- they're sometimes call ultra vires claims,
24 sometimes called nonstatutory review claims. And the reason
25 that these claims are important is exactly this jurisdictional

1 argument that the defendants are seeking to make.

2 First, let's be quite clear, we believe this Court
3 has jurisdiction to hear our APA claims. We believe
4 your Honor set that out very nicely in your most recent order.
5 *Boeing* continues to be good lore. So, that should all be
6 fine. And we believe we'll prevail.

7 THE COURT: This is generally why we don't have to
8 discuss these other issues. But the defendants now argue
9 *Boeing* is meaningless. So --

10 MS. HUNTER: That's correct, your Honor.

11 THE COURT: So, what are they? So, this theory --

12 MS. HUNTER: The defendants' argument about *Boeing*,
13 your Honor, is based on the APA waiver of sovereign immunity.
14 And they are saying that because there is an adequate remedy
15 in the Court of Federal Claims under the Tucker Act, that that
16 waiver of sovereign immunity no longer applies, and so that
17 would divest this Court of jurisdiction over APA claims.

18 Again, we don't believe that that is a good theory or
19 a good argument. Nonetheless, it is the one the defendants
20 have made, has been making all over the country, and have
21 announced their intent to take it to the Fourth Circuit and
22 the Supreme Court. This separate jurisdiction, this ultra
23 vires nonstatutory jurisdiction, has no bearing on that
24 argument. It doesn't involve the APA waiver of sovereign
25 immunity as a separate reason that this Court has

1 jurisdiction. And so, while ordinarily a court may avoid some
2 constitutional questions, here, where the Court is answering
3 those constitutional questions in the context of the APA, we
4 believe it's really important that the Court also addresses
5 those questions in the ultra vires nonstatutory jurisdiction
6 --

7 THE COURT: How is it even different from the APA
8 claim, since, as I understand -- I know y'all make some
9 certain procedural arguments as well, which don't really seem
10 particularly relevant to the grants in which they are no
11 longer contesting. But there are statutory authorizations
12 directing the expenditure of these funds that they no longer
13 contest. That was the basis, as I understood it, of your APA
14 claim, correct?

15 MS. HUNTER: That is a strong basis. There are other
16 things --

17 THE COURT: Other procedural bases.

18 MS. HUNTER: -- that are particularly important for
19 the grants that we're going to discuss in part three. But,
20 yes, you're correct, your Honor. Ruling substantively, ruling
21 on this ultra vires nonstatutory review jurisdiction would be
22 the same argument. It wouldn't be additional work for the
23 Court than ruling under the APA jurisdiction. But I do
24 believe that ruling on Counts 1 and 2 in addition to our other
25 counts would ensure durability of this Court's order. We

1 believe it should be durable regardless. But it would give
2 the plaintiffs a basis for jurisdiction that even the
3 defendants haven't, you know, considered a challenge to what
4 that might look like.

5 THE COURT: Well, is there any different standard
6 between striking agency action or government action --
7 government official action in excess of its authority under
8 the APA and under nonstatutory review?

9 MS. HUNTER: The remedy is slightly different,
10 your Honor, because it would not include the set-aside remedy
11 under the APA. But in terms of the declaratory judgment, I
12 believe it would be the same.

13 THE COURT: How about injunctive relief?

14 MS. HUNTER: Injunctive relief could be issued under
15 both.

16 THE COURT: Yes. When you say "sustainability," what
17 do you mean by that? Are you saying that -- the difference,
18 what was that? I didn't quite understand what you were
19 saying.

20 MS. HUNTER: Oh, sorry. Under the APA, one of the
21 remedies is that you can set aside the agency action under
22 706. That's limited to the APA. So, under the nonstatutory
23 review jurisdiction, it would be more like a simple
24 declaratory judgment with associated injunctive relief.

25 THE COURT: Substantively the same.

1 MS. HUNTER: Yes, your Honor.

2 THE COURT: Let me hear from Mr. Timmons on the issue
3 of nonstatutory review.

4 MR. TIMMONS: Yes, your Honor. So, the first thing
5 I'd like to say is, you know, when you raised the issue on
6 Friday, it was not an issue that I had, frankly, thought about
7 until your Honor brought it to my attention. But it does make
8 sense that if we've resolved the agency action question under
9 the APA, what is the Article III case and controversy left?
10 Is it just to advise on whether or not the executive order
11 exceeded some constitutional principle? And so, I do think
12 that that's an important question to look at.

13 I will be honest with you, over the weekend, I
14 haven't -- you know, I don't know that I've come down to a
15 firm position on it.

16 THE COURT: Well, I have.

17 MR. TIMMONS: Yeah. Yeah.

18 THE COURT: I mean, you know, I expressed on Friday,
19 I said: I'm going to take a hard look at this issue. And
20 unlike you, I did spend the weekend reading. And I read every
21 case I could in the federal judiciary in which this issue has
22 been addressed. I didn't see any response from the government
23 on this claim of jurisdiction in your brief.

24 MR. TIMMONS: Well, your Honor, I would say that our
25 argument has always been the Court does not have jurisdiction

1 over any claim in this case. You cannot repackage a contract
2 claim as a constitutional violation to get jurisdiction in
3 this Court. We have set --

4 THE COURT: I understand that general concept. I
5 looked at your brief. I didn't see anything addressing
6 statutory review theory, *Strickland*.

7 MR. TIMMONS: No, sir, not that theory. But the idea
8 that this Court does not have jurisdiction to decide the
9 constitutional claim, we definitely assert that, your Honor.

10 THE COURT: Well, in the abstract under the APA,
11 you've said it. But if you argue the Court doesn't have
12 jurisdiction under APA, why would the Court not have
13 jurisdiction under nonstatutory review, if that's a recognized
14 legal basis for federal jurisdiction?

15 MR. TIMMONS: On the jurisdictional question?

16 THE COURT: Yeah.

17 MR. TIMMONS: So, as your Honor mentioned, if you're
18 going to sue for constitutional violation for money damages --

19 THE COURT: But that's -- they're not suing --

20 MR. TIMMONS: But that's -- that's -- then we get
21 back to the jurisdictional argument.

22 THE COURT: Well, you say that. I'm not awarding.
23 If I gave them relief here, I wouldn't give them money
24 damages.

25 MR. TIMMONS: But that is the jurisdictional argument

1 we are making.

2 THE COURT: I understand that.

3 MR. TIMMONS: So, that's why we said we've challenged
4 jurisdiction on the constitutional claim.

5 THE COURT: I mean, we're talking in circles here.
6 Their only request, they would only receive injunctive and
7 declaratory relief, nothing more. They have not requested and
8 they will not be awarded, under any theory, damages. I think
9 that is a makeshift argument by the government that has no
10 merit. But you'll get a chance to argue that in another
11 court. And perhaps you'll persuade someone else, unlike you
12 haven't persuaded me. But that's okay.

13 But I'm just trying to address an alternative theory.
14 And I was noting, as I just said to Ms. Hunter, that it was
15 Count 1 and Count 2 of their complaint. It was a bigger deal.
16 You, not inappropriately, focused on the APA issue. I
17 understand that. That's been a hot issue out there. And you
18 focused on it. But, you know, there's another independent
19 basis for court jurisdiction that is as old as the Judiciary.
20 I went back and read *Marbury*. I did. And Chief Justice
21 Marshall definitely -- I mean, they don't have any statute
22 authorizing that review of the executive action. *Youngstown*
23 *Steel*, President Truman seizing control of the steel industry,
24 there's no statute authorizing that.

25 And have you read Professor Chemerinsky's amicus

1 brief?

2 MR. TIMMONS: I have not read his amicus brief. But
3 he was the author of the textbook in my common law class.

4 THE COURT: Well, I'm not surprised. He's probably
5 one of the great scholars of American constitutional law. But
6 I'm going to add his amicus brief to this docket. I think
7 it's a really worthwhile discussion of the legal theory here.
8 You know, it's not something that courts deal with every day.
9 But if the Court has jurisdiction under this statute to
10 address unconstitutional ultra vires action by government
11 officials in their suit -- in their official capacity, let's
12 look at what this is. This is a claim against government
13 officials in their official capacities for action in excess of
14 their legal authority, in which the plaintiff seeks equitable
15 relief only, correct? That's the parameters of this
16 jurisdiction, correct?

17 MR. TIMMONS: No, your Honor.

18 THE COURT: Huh?

19 MR. TIMMONS: No.

20 THE COURT: You're saying no?

21 MR. TIMMONS: It's your -- your Honor, that's your
22 opinion on how the jurisdictional and the relief plays out.

23 THE COURT: No. I'm quoting from *Strickland*. You
24 don't agree with *Strickland*?

25 MR. TIMMONS: I don't agree that the way you phrased

1 the case is how the request for relief is presented, no, I
2 don't.

3 THE COURT: I'm asking -- I was just describing the
4 *Strickland* cause of action as described by the Fourth Circuit.

5 MR. TIMMONS: Yeah. Oh, I'm sorry, your Honor. I'm
6 sorry, your Honor.

7 THE COURT: The Fourth Circuit, I know you told me
8 you want to run there. You might want to read this case
9 before you get there. Have you read *Strickland*?

10 MR. TIMMONS: No, your Honor.

11 THE COURT: Okay. Well, that puts you at something
12 of a disadvantage. It's cited, by the way, in the plaintiffs'
13 complaint. And, you know, it lays out the elements of what
14 this jurisdiction is. And let me repeat it again, because I'm
15 not making this up. This is not my theory. This is the
16 Fourth Circuit's opinion. This is the basis of numerous U.S.
17 Supreme Court decisions of what this jurisdiction means. It
18 is limited to actions against government officials in their
19 official capacity for constituting actions in excess of their
20 legal authority, or otherwise unconstitutional, in which the
21 plaintiff seeks equitable relief. That's it. That's what
22 *Strickland* stands for.

23 MR. TIMMONS: And, your Honor, I want to be clear. I
24 have not asserted that -- you know, I did not assert in our
25 brief that the Court lacks jurisdiction over those claims. To

1 be completely frank with your Honor, I have not reached the
2 solid conclusion that your Honor has. So, you're a little
3 ahead of me. I just want to be honest about that.

4 THE COURT: You'll maybe catch up by the Fourth
5 Circuit.

6 MR. TIMMONS: But I would say I guess our position on
7 that would be, we have not answered the complaint yet.
8 Jurisdiction has been decided, so it's not like -- you know,
9 it's not like going the additional step and reaching a merits
10 argument somehow --

11 THE COURT: I have a motion for preliminary
12 injunction from you. I wouldn't enter judgment on this
13 theory.

14 MR. TIMMONS: Right.

15 THE COURT: But I have a motion for a preliminary
16 injunction. And a preliminary injunction, one of the bases --
17 one of the remaining bases, 32 of the 38 grants, are disposed
18 of. Under the judgment, you've asserted there's no
19 jurisdiction. The plaintiffs reasonably assert an alternative
20 basis for the Court's jurisdiction and request for relief.
21 And that is nonstatutory review. And I have a pending motion
22 for preliminary injunction, which I have an obligation to
23 address. So, I'm now -- you can answer and object and do
24 whatever you want, the plaintiffs filed a motion for
25 preliminary injunction that included this theory, and I have

1 to address it.

2 But you are correct, I would never enter a final
3 judgment on something you haven't conceded. Though, I must
4 say having not contested under the APA, you might think it
5 won't matter before the Court of Claims. It matters in front
6 of me, if you had exactly the same set of facts. I mean, my
7 point was: The facts are identical, the legal standard is
8 substantially the same, the remedy sought is substantially the
9 same. So, I think in some ways your decision not to contest
10 under the APA, you know, creates a strong basis for the
11 plaintiffs to argue a likelihood of success on the merits for
12 their preliminary injunction. You understand what I'm saying?

13 MR. TIMMONS: Yes, your Honor. And, I mean, I'm not
14 suggesting to your Honor you can't decide arguments that are
15 presented to you. I'm just suggesting one approach would be
16 that we can resolve the issue of preliminary relief on the APA
17 so there is not a need to go the extra step and address
18 constitutional --

19 THE COURT: I'll do the extra step. Don't worry.
20 I'm ready to do it. I've done the work. Unlike you, Mr.
21 Timmons, I actually read all this. And I think there's a
22 solid basis to address preliminary injunction. So, when you
23 go over to the Fourth Circuit, you're going to face both
24 jurisdictional issues and you'll have to confront both of
25 them. And, you know, you'll have to persuade the Fourth

1 Circuit that the decision in *Strickland* is wrongly decided.
2 That's your prerogative. You have to give them notice you're
3 going to argue against a precedent. But I think the
4 plaintiffs have an incredible basis. I want to hear from
5 them, and then I want to hear from you on the *Winter* standard.

6 So, why don't we let me go back to Ms. Hunter and
7 then I'll come back to you on this issue.

8 Ms. Hunter, assuming I find jurisdiction, which I do
9 on the nonstatutory review, I now move to your motion for a
10 preliminary injunction. And tell me under the *Winter*
11 standards why I should grant you preliminary injunctive
12 relief.

13 MS. HUNTER: Thank you, your Honor. Well, we are
14 likely to succeed on the merits, both on terms of our
15 nonstatutory review claims and on our APA claims. The
16 defendants have conceded as to 32 of those APA claims. I
17 believe you wanted to address the other six later.

18 THE COURT: And by the way, as to the issue of
19 preliminary injunction right now, I'm only addressing the 32
20 which have already been uncontested. We'll move in a minute
21 to the other six.

22 MS. HUNTER: So, likelihood of success seems fairly
23 straightforward at this juncture, your Honor. We've discussed
24 irreparable harm already this morning. We've presented
25 substantial irreparable harm in declaration testimony which

1 we've continued to update over time, as that harm has become
2 more and more acute. In this case, the balancing of the
3 equities and the public interest merge because the government
4 is a party. And we have made strong showing that it would be
5 in the public interest both for the people and the public on
6 the ground, but also for the normal orderly rule of law for
7 these grant programs that were passed by the thoughtful
8 process of Congress and then the thoughtful Administration of
9 the prior executive to continue. And so, we would ask that
10 you preserve the status quo and issue a preliminary injunction
11 in the plaintiffs' favor.

12 THE COURT: Well, let me ask you this. Of these 32
13 grants, I have tried to trace them a bit to statutes. And I
14 think I've largely done that.

15 MS. HUNTER: Yes.

16 THE COURT: It is the plaintiffs' assertion that
17 these grants are based upon mandatory appropriations of
18 Congress, correct?

19 MS. HUNTER: That's right, your Honor.

20 THE COURT: Their common language is they shall be
21 expended for this purpose, correct?

22 MS. HUNTER: That's correct, your Honor.

23 THE COURT: And it's the plaintiffs' theory that to
24 cancel the grants because the present holders of office
25 disagree with that mandate is ultra vires.

1 MS. HUNTER: That's correct. And in our most recent
2 brief we put a little more meat on the bones with regard to
3 each grant program and connected the statutory language to the
4 language of the executive orders. And I think what we see in
5 many cases is that this statutory language is actually
6 diametrically opposed to the stated policies of the executive
7 branch.

8 THE COURT: Well, that's why when, you know, Mr.
9 Timmons was saying, well, there was a change in policy, I
10 said: What's the policy? Because if the policy is not to
11 follow the law, that's not -- that's a discretion one cannot
12 exercise, correct?

13 MS. HUNTER: That's correct. And as far as we can
14 tell, the policy, as these executive orders, once again, seems
15 to essentially be saying is: Don't follow the law,
16 particularly with these IRA and IIJA grants.

17 THE COURT: Well, I mean, I don't have any doubt that
18 the present agency officials don't agree with those laws,
19 correct?

20 MS. HUNTER: Correct.

21 THE COURT: And as American citizens, they can speak
22 out against them, correct?

23 MS. HUNTER: That's right.

24 THE COURT: But they don't have the authority to
25 violate an act of Congress.

1 MS. HUNTER: No. And I think that unleashing
2 executive order, if you boil it down, it essentially says: We
3 will eliminate these two congressionally mandated programs,
4 the IRA and IIJA.

5 THE COURT: Well, you keep wanting me to go to the
6 top. And my tendency is to go to the people who actually
7 committed the acts. Because I think there's, frankly, a
8 little ambiguity, probably intentional, in those executive
9 orders. But there's no ambiguity at the agency level.

10 MS. HUNTER: That's correct, your Honor. But I would
11 note that one thing that the nonstatutory review of
12 jurisdiction gets you is that ability to go to the top. The
13 President is --

14 THE COURT: There's no question. I mean, *Marbury v.*
15 *Madison*, *Youngstown Steel*, obviously, I get. The question is:
16 What do I need to do? Because I'm trying to find a way, if I
17 find a wrong, to find a remedy. And the question is: What do
18 I need to do to establish it?

19 I, frankly, think if you compare those agency memos
20 about cancel everything, or find me every word with "economic
21 justice" in it and cancel it, is broader than those executive
22 orders. They don't exactly say that. In fact, their
23 questions in some of these documents I've been sent in which
24 they say what does this mean, they're asking the OMB what does
25 this mean, because the agencies are a little confused: Are we

1 only talking about the New Green Deal or are we talking about
2 everything? And OMB makes it very clear: We're talking about
3 everything, right? So, you know, the question is: Where do
4 you -- who actually freezes or terminates these grants?

5 MS. HUNTER: Yes. And as we discussed already,
6 your Honor, I think the defendants were very helpful in
7 elucidating that in these declarations, which did explain
8 that, you know, for EPA, they were terminated by this
9 particular person and likewise for USDA.

10 THE COURT: Yeah. Okay. Let me hear from Mr.
11 Timmons on the issue of whether preliminary injunctive relief
12 under the nonstatutory review -- first of all, why are the
13 plaintiffs not likely to have a success on the merits for the
14 same reason they're having success regarding the 32 grants
15 under the APA?

16 MR. TIMMONS: Again, your Honor, it's a
17 jurisdictional argument there.

18 THE COURT: What's the jurisdictional argument?

19 MR. TIMMONS: That you cannot repackage a
20 constitutional claim as a -- you cannot repackage a claim for
21 money damages as a constitutional claim. And, your Honor, I
22 don't want to frustrate the Court. So, if the Court has
23 already rejected our analysis of the equities here and the
24 likelihood of success, we can stand on our brief and the
25 arguments we've made.

1 THE COURT: Well, your brief doesn't address it, so
2 that's why I'm asking you.

3 MR. TIMMONS: It does, your Honor. We -- we do have
4 -- I mean -- I just -- I know you do not agree with the way
5 that we've balanced the equities or the way we've calculated
6 the harm. And so, I'm happy to advance that argument, but I
7 think you're going to tell me that you don't agree with me.

8 THE COURT: Well, it's not a question of whether I
9 agree with you. I asked you, Mr. Timmons, initially, I said I
10 was told there was individualized review before these grants
11 were frozen. And I asked for documents to show me that. I've
12 been through the documents. They don't show that. So, then
13 you told me that you were confident they had made
14 individualized reviews before they terminated.

15 MR. TIMMONS: No. I don't believe I said that,
16 your Honor.

17 THE COURT: You don't think you said that?

18 MR. TIMMONS: I could be wrong, but --

19 THE COURT: You're wrong. Let me read you from your
20 transcript. Docket 142, page 35:

21 "MR. TIMMONS: I would say that if the pause was as
22 you said, it was a broad pause based on funding" -- which was,
23 by the way, a new concession on your part.

24 Then you said: "I do think the terminations were
25 done based on a review of the grants."

1 MR. TIMMONS: Yes, your Honor.

2 THE COURT: That's why I asked for the grant reviews.
3 And they don't show individual review. Mr. Voyles claims he
4 has individual reviews for some unknown number of grants he
5 cancelled in one day without a single piece of paper, which he
6 claims he orally -- orally -- related to some other official.
7 I've been involved with government for a lot of years. I've
8 never seen a decision of any substance without a paper trail,
9 without a set of documents, reasoning, explaining, documenting
10 the review, the explanation for it.

11 I was, frankly, embarrassed for the government to
12 read Mr. Voyles' affidavit. I've just never seen anything
13 submitted to me like that. It was, frankly, sort of an insult
14 to the Court. You know, y'all can do what you wish. I'm used
15 to the government speaking to me straight, to answer my
16 questions honestly. Fifteen years on the bench, I've never
17 had an experience where I thought the government did not do
18 that.

19 MR. TIMMONS: Well, your Honor, I'm sorry that I've,
20 you know, kind of hurt your faith in our office. I'm trying
21 my best to answer the questions based on the information I
22 have. We're talking about -- we're talking about one grant
23 program out of 21. And so, you know --

24 THE COURT: I'm sorry?

25 MR. TIMMONS: There's 21 grant programs at issue in

1 this case. And we're talking about one of those 21 grant
2 programs and how that was decided.

3 THE COURT: Yeah. But I -- I --

4 MR. TIMMONS: And I think I was fair in saying that
5 -- oh, go ahead. I'm sorry.

6 THE COURT: But I asked you for all the information
7 on all the grant terminations and I got no -- to avoid this
8 very issue, Oh, there are more, I gave you every chance. I
9 have received, I think, 9,500 pieces of paper. Nothing shows
10 any individual review.

11 And my colleagues, other district courts around the
12 country, at the preliminary injunction stage, have relied on
13 the word of the government. I just said, like Kansas: Show
14 me. Show it to me. And what I find is nothing. There's
15 nothing. What the plaintiffs allege happened. The new
16 Administration didn't like the former actions of Congress
17 acting ultra vires, and cancelled grants that were mandated,
18 and now wants to argue that I don't have the jurisdiction to
19 hear it. I do have jurisdiction. I have it on two
20 independent grounds. I'm going to enter judgment today. I'm
21 going to grant a preliminary injunction under the nonstatutory
22 review.

23 Now, let's turn to the six grants contested.

24 Ms. Hunter, let me make sure I sort of understand
25 what these grants are all about. Mr. Timmons shared with me

1 -- and I didn't know this -- at our last hearing that these
2 Commodity Credit Corporation grants, these six grants -- this
3 is 27 through 32 grants -- that these were appropriated funds,
4 generally appropriated funds, to the Department of Agriculture
5 in which the former Administration had elected to create
6 something called the Partnership for Climate-Smart Commodities
7 and then awarded grants. Do I have that part right?

8 MS. HUNTER: Yes, your Honor. Essentially, it's
9 through the Community Credit Corporation.

10 THE COURT: Yeah. And so, I raised then, I said,
11 well, that looks a little different to me, when Mr. Timmons
12 shared it with me. So, I was very interested in whether that
13 appears to be correct. I noticed in your complaint -- and you
14 said it upon information and belief, so I think you didn't
15 really know that it might have had some IRA money. But I
16 don't see any evidence of IRA money for these particular
17 grants. Do you have anything to the contrary?

18 MS. HUNTER: No, your Honor. I mean, there was a
19 press release -- and apparently we're using press releases
20 now. That's what the defendants have offered for these
21 claims. We were trying to get to the bottom of these grants,
22 because, as your Honor noted, they were cancelled at the same
23 time as all of the other IRA grants. So, we were trying to
24 better understand that. And we did find a press release at
25 the time from the Biden Administration which suggested that

1 IRA money had been used to supplement this pot of grant
2 funding.

3 And in the press release that the defendants cite in
4 their most recent brief -- which they didn't attach, so I'm
5 not sure if we have the right one, but we think we have the
6 right one -- the quote from the secretary is: "The
7 Partnership For Climate-Smart Commodities initiative was
8 largely built to advance the Green New Scam, which seems
9 similar to the language being used about the Green New Deal in
10 the executive order.

11 THE COURT: But it didn't tell us the source of the
12 funding.

13 MS. HUNTER: It didn't. And I don't actually think
14 it's relevant where the funding came from, your Honor.

15 THE COURT: Well, let me say this. There's sort of
16 several different theories of liability under the APA. One of
17 them is that these officials acted contrary to appropriations
18 of Congress that were specifically mandated. Those are grants
19 1 through 26 and 33 through 38. Okay. And I've already told
20 you my thoughts about that. When we get to the ones that are
21 terminated -- I think they're now terminated, those six
22 grants. Because the Administration seeks to -- the secretary
23 seeks to repurpose the moneys, which I think we agree there
24 can be lawful changes in policy, right -- we know that,
25 there's a statute that says that -- as long as they have the

1 discretion to do it. And if there's general appropriated
2 funds, general agencies have discretion. And as I understand
3 the representation of the government -- and if it's not
4 correct, I want you to straighten me out on this -- is that
5 they have decided to repurpose the money and they call it a
6 different program. I can't remember the name of it right now.
7 But it appears to have a similar mission. But they're
8 insisting on 65 percent of the money to go directly to
9 producers, not to overhead. Not an unsympathetic view, you
10 know, just extracting without knowing details. And the
11 plaintiffs have been invited -- these six grant recipients
12 have been invited to apply for the new grant and will have the
13 opportunity to demonstrate that they can meet the
14 requirements.

15 Any part of that seem to be wrong?

16 MS. HUNTER: No, your Honor. Except, I would say
17 that this isn't just a sort of general appropriation. It is
18 within this Community Credit Corporation set of funds, which
19 is there to stabilize and advance the interests of farmers,
20 which this abrupt change without notice or any review does not
21 --

22 THE COURT: It's probably not -- maybe, you know, in
23 government, class might not be the model way to change policy.
24 I see that. But I'm at a point of having to look at
25 preliminary injunctive relief. And let me just be honest with

1 you, the facts are kind of a muddle to me right now, unlike
2 your evidence about, you know, we can trace an executive order
3 to an OMB, to an agency memo, to -- to internal memos to say
4 get all these grants, and, boom, they're gone. That's really
5 strong -- it's not even circumstantial, it's direct evidence.
6 I don't have that here. You know, I don't have it here. And
7 it's more of a procedural argument, you know: Did they
8 consider reliance? Did they file a fair process? Contrary to
9 the other ones, which there's no evidence they're planning to
10 spend the money on anything. They're here, announcing a
11 program. This is different.

12 And, you know, preliminary injunctive relief is
13 extraordinary relief, right? *Winter* says it's not entitled in
14 every case by any means. It's not routinely granted in any
15 essence. And I'm just having trouble getting through the
16 first step of this, of showing a likelihood of success. I'm
17 not saying that once we get into the -- we build a fuller
18 record, not relying on press releases, that we actually -- you
19 might persuade me that this was unlawful. But I'm struggling
20 right now to meet the -- you know, I take these standards very
21 seriously. And I'm just -- I'm just -- I'm having trouble
22 getting where I can say that there is a likelihood of success
23 on the merits. The answer is kind of what Mr. Timmons said
24 about his knowledge of *Strickland*: I don't know. I mean, I
25 don't know on this. And I think it would be irresponsible for

1 me to issue an injunction on something I don't really fully
2 understand.

3 Now, what you can do is go build a record on this.
4 And I'm open to considering. When I say "I don't know," I
5 don't have an opinion one way or the other. I just can't --
6 you just can't -- in my view, you can't meet your burden to
7 show a likelihood of success because the record before us is
8 so limited. Frankly, I'm sure you aren't too thrilled to be
9 relying on a press release as the basis of your evidence, but
10 you'll have your chance to take depositions and to further
11 develop the record. And it may be that, on the merits, you
12 know, we'll have -- I will be able to make a definitive
13 determination one way or the other. I'm just not comfortable
14 at this point with this paucity of a record to make a finding
15 for preliminary injunctive relief.

16 But I invite further review to talk with the
17 government to try to get more evidence and to get more
18 discovery done to see whether there might be a basis under
19 either the APA or some other grants. You know, it doesn't
20 seem that there's a violation of the constitutional provision.
21 There is not a specific statute that we're violating here.
22 So, we're really an APA claim. And I think we just need more
23 evidence.

24 You know, there are two parts of the APA: There is
25 sort of the procedural, and there's the substantive. And the

1 32 grants are sort of prevailing on the substantive part, not
2 the procedural. And you're asking me basically on a
3 procedural grant. And the evidence, in my view, just isn't
4 there at this point to meet the plaintiffs' burden.

5 MS. HUNTER: Thank you, your Honor. And I agree with
6 that general assessment. I will say that the Court has been,
7 I think, extraordinarily generous with the defendants in
8 allowing them to offer up what is the record to support their
9 termination of these grants. And in many ways, I think it's
10 no different than the other grants, where there is no paper
11 trail. And the fact that what they did present -- the only
12 thing they presented in their most recent briefing was this
13 press release, which was intended to demonstrate a reasoned
14 process and a consideration of --

15 THE COURT: Well, it might not be true. It might not
16 be true. And you can come back and show me that, okay?

17 MS. HUNTER: Right.

18 THE COURT: But, if it is true -- it is reasoned, if
19 it's, in fact, true. And I presume your clients are going to
20 apply for these grants?

21 MS. HUNTER: I believe many of them might,
22 your Honor, yes.

23 THE COURT: Yeah. I think they should if they really
24 want to participate. And then if they think this was a
25 charade or untrue or whatever, then you'll actually -- and

1 you'll have some chance to take some depositions and gather
2 more documents. But at this early stage, I think we're
3 struggling to figure out -- this just seems to be another
4 kettle of fish to me. This is just a different theory.

5 And I can understand in the beginning it all happens
6 at the same time. You're assuming there's one kettle of fish,
7 you know. And I think your complaint shows that you're
8 thinking maybe there's IRA money in all this. You're not the
9 first plaintiff to file a lawsuit and find out facts might be
10 somewhat different. I will say, mostly your facts are proven
11 to be true. You went and got the documents. So, I'm not in a
12 position to issue a preliminary injunction on the six.

13 Mr. Timmons, you want to buy it back, or are you
14 happy to stand on what you've said already?

15 MR. TIMMONS: I think I'm good, your Honor. Thank
16 you for the opportunity, though.

17 THE COURT: You're going to let Mr. Berlinsky argue
18 that part?

19 MR. TIMMONS: Yeah. He wants to take this one. He's
20 confident. I didn't see him hop up before.

21 THE COURT: No, I didn't either.

22 Yes, Ms. Hunter.

23 MS. HUNTER: The only thing that I would ask is that,
24 as these plaintiffs -- you know, a lot of these plaintiffs are
25 the ones having to furlough staff and are certainly suffering

1 significant harm on a daily basis that, you know, the sooner
2 we can move that process along and move discovery along, that
3 would be appreciated, your Honor.

4 THE COURT: Well, you know, I will take it that the
5 32 are going to go up on appeal, and the six will be here.
6 And we'll issue a scheduling order, and you can start taking
7 depositions.

8 MS. HUNTER: Thank you, your Honor.

9 THE COURT: You've got an answer due, I think, today;
10 is that right? I think today we have an answer due.

11 MR. TIMMONS: The answer is due a week from tomorrow.

12 THE COURT: Oh, I missed it by a week. Okay. And
13 then we'll issue a scheduling order. And I don't know of any
14 reason, if the other ones go up on appeal, why I would need to
15 hold these in abeyance, since they're not really covered by my
16 order.

17 Any disagreement with that from anybody? Can we go
18 ahead and address the six to which I'm not granting relief?

19 MR. TIMMONS: Your Honor, we're going to file a
20 motion to dismiss based on 12(b)6 for failure to exhaust on
21 that. So, after that issue is resolved, we --

22 THE COURT: Well, you'll file a 12(b)6. We'll
23 address it.

24 MS. HUNTER: Your Honor, can I clarify? Should we
25 also be swiftly moving for summary judgment on the ultra vires

1 nonstatutory basis?

2 THE COURT: Well, I think the defendant has a right
3 to answer. The only reason we're getting to judgment is
4 because they are not contesting. Okay. It's uncontested
5 claims. There's no reason. But I think they have a right to
6 file and address those issues. And in the interim, you'll
7 have preliminary injunctive relief on that theory. But I
8 think you would be premature to file for summary judgment
9 before they answer. And you may want to create or may not
10 want to create more of a record. If you feel like your record
11 is adequate after -- I presume they're going to make a motion
12 to dismiss. I'll address that issue. I've substantially
13 addressed that issue already here. And then you do as you
14 wish. I don't tell plaintiffs or defendants how to try their
15 cases.

16 MS. HUNTER: Okay. Thank you, your Honor. So, just
17 a final point of clarification: Your Honor plans to issue a
18 preliminary injunction on both jurisdictional theories but
19 also judgment on the APA?

20 THE COURT: No. I'm entering -- on the APA claims,
21 I'm entering judgment and granting permanent declaratory and
22 permanent injunctive relief. Those are over. The defendants
23 are not contesting under the APA. That's over. They can take
24 that up on appeal. They've got a final judgment.

25 On the nonstatutory review, I'm going to grant

1 preliminary injunctive relief, not permanent. And then I'm
2 going to deny the motion for preliminary injunction as to the
3 six contested. My goal is to get that out today, but it may
4 be tomorrow before that happens.

5 MS. HUNTER: Thank you, your Honor.

6 THE COURT: Mr. Timmons, anything further from the
7 government?

8 MR. TIMMONS: No, your Honor.

9 THE COURT: Thank you. This hearing's adjourned.

10 * * * * *